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IN THE

Supreme Court of the United States

No. 71-142

MILTON KIRSNER, et al.,

Petitioners,

v.

ARNOLD FLEISCHMANN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Appellants, Milton F. Kirsner, et al., petition for a Writ of Certiorari from a decision of the Court of Appeals of the State of Maryland, said case being reported in the case of *Milton F. Kirsner, et al. v. Arnold Fleischmann, et al.*, No. 297, Court of Appeals of Maryland, March 3, 1971 and cited as 274 A.2d 339 which was an appeal from a decision in the Superior Court of Baltimore City, Folio 1610, Docket 1969, File No. 120363, and styled *Arnold Fleischmann, et al. v. Milton F. Kirsner, et al.*, said opinions appended hereto hereafter.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 2101(c) (Supreme Court); Title 28, Section 1257, and Title 28, Section 1651(a), the Fourteenth and the Seventh Amendments to the Constitution of the United States and Volume 3, Freeman on Judgments, Section 1350, page 2774.

OPINION BELOW

The date of the Judgment aforesaid entered by the Court of Appeals of the State of Maryland was on March 3, 1971. A Motion for Re-Argument was filed on April 2, 1971 and said Motion was denied on April 5, 1971 by the Court of Appeals of the State of Maryland. On June 11, 1971 in the Supreme Court of the United States, under October Term, 1970, Milton F. Kirsner, et al., Petitioners, v. Arnold Fleischmann, et al., an Order dated June 11, 1971 extended the time for filing a Petition for Writ of Certiorari to and including July 29, 1971.

QUESTIONS PRESENTED FOR REVIEW

1. Jurisdiction. The Court of Appeals of the State of Maryland entered Judgment based on a contingency contract for a percentage of savings in a tax delinquency matter basing performance of said contract on consent decrees entered in the Tax Court of the United States, such decrees specifically being void and illegal by virtue of Title 26 U.S.C., Section 6213(d).

2. Can the Judgment of a State Court based upon a Consent Decree of the Tax Court of the United States be collaterally attacked on jurisdictional grounds?

3. Whether a citizen's right to trial by jury and other common law rights granted under the Seventh Amendment of the Constitution of the United States can be eliminated

while collateral and Federal issues are pending before the Fourth Circuit Court of Appeals of the United States.

4. Whether the rights of a citizen under the due process clause of the Fourteenth Amendment of the Constitution of the United States are violated by application of the Summary Judgment rules of a state and the judgment they entered.

5. Are the rights of a citizen to due process under the Fourteenth Amendment of the Constitution of the United States violated by the violation of the attorney-client privilege.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

1. Title 28 U.S.C., Section 2101(c), page 5073: Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a Writ of Certiorari for a period not exceeding 60 days.

2. Title 28 U.S.C., Section 1257, page 5015. State Courts; Appeal; Certiorari. Final judgment or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes thereof, or commission held or authority exercised under, the United States.

3. Title 28 U.S.C., Section 1651, page 5043. Writs. (a) The Supreme Court and all Courts established by Act of Congress may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

4. Constitution of the United States, 1787; the United States Code, page XLVII, Amendment XIV, due process. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Constitution of the United States, 1787. The United States Code, page XLVI; Amendment VII. In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of common law.

6. Volume 3, Freeman on Judgments, Section 1350, page 2774. A consent judgment, "is not subject to collateral attack except upon jurisdictional grounds." *Hobbs v. Duff*, 43 Al. 415; *Semple v. Wright*, 32 Cal. 659.

STATEMENT OF THE CASE

Suit was brought by Appellees herein in the Superior Court of Baltimore City, citation supra, for attorney's fees based upon a contingency contract calling for a fee of 15 per cent pursuant to a schedule after an extensive audit called a claim by Internal Revenue Service. Stipulated decrees were approved by the United States Tax Court and such decrees have been appealed from by the Appellants herein, said appeals presently awaiting decision by the Fourth

Circuit Court of Appeals of the United States, Richmond, Virginia. Appellants appealed judgments in the Superior Court of Baltimore City to the Court of Appeals of the State of Maryland, which Court entered judgment in favor of all of the Appellees except Samuel L. Silber affirmed and judgment is entered against Samuel L. Silber for costs. All costs on appeal to be paid by the Appellants. In the decision of the Court of Appeals of the State of Maryland, 274 A.2d 339, we quote from page 343 as follows: "We detect no problem, however, with the fact that the appeal from the denial of the Motion to Vacate is still pending, for Kirsner has offered no legal or logical theory as to why the vacation of the Consent Decree would have any necessary effect on the acceptance of performance which served as a basis for that Decree." The Consent Decree referred to above by the Court of Appeals is the stipulated Decrees of the Tax Court of the United States which have been appealed from by the Appellants.

REASONS FOR GRANTING THE WRIT

Under Title 26 U.S.C., Section 6213(d) the Tax Court, absent a waiver by the taxpayer, has no authority or jurisdiction to accept and enter such stipulated Decrees. This question is pending in the Fourth Circuit Court of Appeals of the United States and if its decision is in favor of Appellants, the said stipulated Decrees, stated as Consent Decrees by the Court of Appeals, will be ruled invalid and there will in fact be no tax saving. Since this decision of the Circuit Court of Appeals of the United States is pending, and since there is the definite possibility that the stipulated Decrees of the Tax Court of the United States may be ruled invalid, or remanded, the question of whether or not there was in fact any tax savings has not been answered and Appellees suit for attorney's fees is thus premature. Further, Appellants contends that the State Courts thus cannot rule on such a point since the State Court quoted thereon above, has based its decision on the Decree of the Tax Court, has

no jurisdiction until the Federal Courts rule upon the jurisdiction of the United States Tax Court. In such a circumstance, the Maryland Court of Appeals has committed or taken an excess of jurisdiction not available to it, since it is basing its decision upon the decision of the Tax Court of the United States, presently being appealed from. Title 26 U.S.C. 6213(d). Waiver of Restrictions: The taxpayer may at anytime by a signed notice in writing filed with the District Director waive the restrictions on the assessment and collection of the whole or any part of the deficiency. The notice must in all cases be filed with the District Director or other authorized official under whose jurisdiction the audit or other consideration of the return in question is being conducted. The filing of such notice with the Tax Court does not constitute filing with the District Director within the meaning of the Code. After such waiver has been acted upon by the District Director and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn (Reg. 301.6213-1).

The jurisdiction of the State Court may also be collaterally attacked even where there is a stipulated decree. Vol. 3, Freeman on Judgments, page 2734; *Hobbs v. Duff,* 43 Al. 415; *Semple v. Wright,* 32 Cal. 659. Since if the Federal Courts rule that the Tax Court did not have jurisdiction, its Consent Decree would be void and the savings would in fact not exist. To rule prior to the Federal Court's decision, since until such decision there is no savings in fact, is to rule on a Federal question and prior to determination of the Federal question. Therefore, the State Court of Appeals lacks jurisdiction to so do. In many cases, a fee based on a compromise is acceptable, as in the compromise of a negligence or simple contract case, but not herein, since such compromises are based upon the Federal law as stated above in Title 26 of the U.S. Code and which must be specifically and accurately complied with. Such has not been done in this case since there is the lack of consent required under Title 26 of the United States Code, Section 6213(d), in regard to jurisdiction.

In reference to the Seventh Amendment of the Constitution of the United States, citation above, the Defendants were not only deprived of a jury trial under the Seventh Amendment of the United States and deprived of all of the common law rights incident thereto, but also the Summary Judgment Procedure of the Maryland Rules of Procedure set out in Volume 9B Annotated Code of Maryland, 1957, Rule 610.c. ". . . Every such motion shall be accompanied by a notice to the adverse party (1) stating the time at or after which the motion may be heard and (2) warning him that upon his failure to plead within the time allowed by law or rule of Court, judgment will be entered against him." Kirsner never received such notice as is indicated by the docket entries hereafter in appendix. Under Summary Judgment, because of the possible dangers involved in eliminating trial by jury and other common law rights, rules regarding summary judgment must be strictly construed. *U.S. v. Stangland,* 1957, 242 F.2d 843; *Eccles v. People's Bank of Lockwood Village, California,* 1948, 68 S.Ct. 641, 333 U.S. 426; 92 L.Ed. 748; Rehearing denied 68 S.Ct. 909, 333 U.S. 877, 92 L.Ed. 1153.

It is reasonable to state that a Defendant's rights to a hearing cannot be forfeited on advice of counsel.

Further, in a more detailed discussion of Summary Judgment, in the case of *Hauschildt v. Collins,* 4 P.2d 99 at page 101, quoting a case of the Okalhoma Gas & Electric Company, 146 Oklahoma 272, 288 P. 316, the Court held as follows: "By due proces sof law is meant an orderly proceeding adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, with full power to grant relief." *Kennard v. Los,* 92 U.S. 400, 6 R.C.L. 436, 23 L.Ed 478; *Calwell v. Texas,* 137 U.S. 692; 11 S.Ct. 2244.

The Seventh Amendment provides, "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the

United States, then according to the Rules of the common law."

In this case Summary Judgment was granted and affirmed pursuant to Motion for Summary Judgment, pleadings, affidavits and a hearing on Motion in which the principal officers and the principal were not called. Further, the authority quoted by the lower Court and the Court of Appeals of the State of Maryland do not refer to an attorney-client case or one of summary jurisdiction.

On the other hand, in an attorney-client case, *Tomsky v. Superior Court of City and County of San Francisco,* the Court quotes *in re Pascual,* 10 Wall 492, 19 L.Ed. 118, and states, that when there is no professional misconduct the Court will not exercise Summary jurisdiction; and, as the proceeding is in the nature of contempt, a respondent ought to be able to protect himself rather than submit to the Court's peremptory refund order, although he had more monies of the client than was agreed.

Apparently, the Courts long ago, and in other opinions, protected the rights of the attorneys to have their full day in Court. Why should not their clients, a taxpayer, have the same and similar relationship?

The Seventh Amendment does not concede that Summary Judgment can abolish common law rules and rights, especially when Federal litigation is involved as in the case at bar.

Further, under the Fourteenth Amendment of the Constitution of the United States, the Defendant's rights were also affected by the opinion of the Superior Court of Baltimore City with reference to the Judgment, as follows:

(a) The opinion of the lower Court recited that it was a judgment of $40,276.93 plus costs of suit. The Judge ordered that this judgment be entered against Milton F. Kirsner and each of the 20 corporate defendants. In practice, since that judgment, this has been construed to be a judgment of $40,276.93 times 21 instead of a judgment of $40,276.93, jointly and severally against the 21 entities.

(b) With relation to the judgment and the Fourteenth Amendment, the Order of Judge Prendergast reopening the judgment after an appeal bond had been put forth and increased, ordered that the lien of attachment shall continue against all assets of the Defendants listed in the plea of garnishee filed by the Baltimore Federal Savings and Loan Association and Free State Realty Company, Inc. Free State Real Estate, Inc. is not a garnishee but one of the Defendants herein. The Order is more fully stated on pages two and three of the Motion for Stay of Execution pending Certiorari, reference Order of July 16, 1970 by Honorable J. Gilbert Prendergast of the Superior Court of Baltimore City, cited above. This Order is not only defective because of confusing one of the garnishees with a corporate Defendant, but because the Order is directed against the assets of the Defendants rather than the corporations themselves. *Gibbs v. Queen Insurance Company*, 63 N.Y. 114.

The Court of Appeals of Maryland does not refer to the trial Court Judgment amount and does not affirm or deny its amount; it simply states that Kirsner can apportion the judgments against the Consent Decree to realize corporate savings or losses. The Court of Appeals directs the set off of Decrees against Judgments although the lower Court spoke of it as a Judgment. The Court of Appeals of the State of Maryland states: "There is, of course, no reason why Kirsner cannot apportion the costs of Judgments according to the proportionate losses or benefits in tax savings each corporation received under the Consent Decrees." There was no further mention of the amount due pursuant to the Summary Judgment of the lower Court. The Court of Appeals refers to the Summary Judgments of lower Court although it was an order. This ambiguity reflects what has been said before, that is, it is a judgment of $40,276.93 times 21, although that was not the intention of the lower Court. This violates the due process clause of the Fourteenth Amendment.

Moreover, under the due process clause of the Fourteenth Amendment, the Court of Appeals of Maryland does not

have the authority to direct Kirsner to apportion costs of a Judgment or Judgments of Consent Decrees of another form, that is, the Tax Court of the United States, especially so in that there were 21 defendants in this case, one individual and 20 corporations, and the Tax Court involved only 17 defendants, all corporations and no individual or individuals.

In the lower Court, that is, in the Superior Court of Baltimore City, see appendix of Summary Judgment proceedings and direct testimony of Felix S. Jacob, Mr. Jacob states that at the hearing of November 19, 1969, Mr. Kirsner was there to testify in person, and Mr. Silber and Mr. Fleischmann were called as adverse witnesses by the Government. This testimony of November 19, 1969 refers to a hearing before the Tax Court of the United States. Since Mr. Silber and Mr. Fleischmann were in fact attorneys for Mr. Kirsner in the very same tax matters, Mr. Kirsner's rights to due process under the Fourteenth Amendment of the Federal Constitution have been violated by this violation of the attorney-client privilege.

The Maryland Court of Appeals stated that the termination, or attempted termination, of services by Silber and Fleischmann, et al., were waived by the subsequent use of them in the case before the Tax Court, granted Summary Judgment and prevented testimony that in the interim, Appellants employed David Gerber to confer with the opposing counsel, and that he, David Gerber, was prevailed upon by Mr. Silber and Government counsel to withdraw after Mr. Silber himself withdrew. This is duress and in violation of the Fourteenth Amendment of the Constitution of the United States. (This appears in testimony in the Tax Court case.)

Milton F. Kirsner's affidavit, set out in appendix, evidences that the Tax Court matter has not been finally determined and that he received a letter wherein Appellants terminated their services and instructed him to engage other counsel. See appendix.

It also evidences that the Defendant in these matters are separate entities, and they have not been advised by the Plaintiffs as to what, if any, claim for services the Plaintiffs are making against each of the individual Defendants. This is in violation of the Fourteenth Amendment also.

According to affidavit and counsel, Regency Realty, Inc., The "516" Incorporated, and Jade Realty, Inc. were never assessed with tax deficiencies by the Internal Revenue Agent's report, but the opinion also evidences that, amongst other things, the lower Court's ruling is falacious. The lower Court said (see appendix) "On the critical questions involved in this Motion, the Court finds that the Plaintiffs have performed fully in accordance with their contract of July 26, 1966, as evidenced by executed agreement of settlement dated July 1, 1969."

The Court of Appeals of Maryland affirmed this line of reasoning in their opinion but the executed agreement of settlement of July 1, 1969 is not a fact.

On page 6 of the opinion of the Court of Appeals of Maryland, set out in appendix, the Maryland Court asserts, and I quote, "Kirsner, acting individually and on behalf of his corporations, has never denied that he affirmatively assented to the Decrees"; but the Tax Court cases do not reveal that individually Milton F. Kirsner was a party.

The Maryland high Court also asserts that the Appellees could not avoid aggregating the corporations' income; that is a fabrication of the high court because there is no testimony or anything in the record regarding this assertion; on the other hand, the Court states in the next paragraph, and I quote, "He endorsed the Decree which by its very terms recited that it had been entered pursuant to the agreement of the parties"; and the agreement does not appear as a fact in the record but simply states "pursuant to an agreement." These misconceptions of the Maryland high Court are also violative of the Appellants' rights under the Fourteenth Amendment.

The Maryland Court of Appeals, on page seven, appendixed, states, that acceptance of performance was the basis for the Consent Decree; and therefore the Court is deciding a Federal Court matter, that is, the validity of the Tax Court Decree, and makes it an integral part of the decision although this matter is still pending. The Maryland errs again in that the Internal Revenue Code, Title 26, does not conceive of the taxpayer as one who accepts performance, but only as one who makes an offer. Title 26 U.S.C., Section 6213(b) (numeral 3).

On page eight of the opinion of the Court of Appeals of the State of Maryland (see appendix) the Court in considering high fees, which are illegal under Internal Revenue Regulations, stated that, and I quote, "Judge Howard admonished Kirsner that these allegations would require factual support. No attempt was ever made to supply that deficiency in the opposition to the Motion for Summary. Judgment." In the Answer Appellants refer to this again, but nevertheless, Summary Judgment was granted and the presentation of facts were prevented. To the contrary, adequate argument on this point is set forth in the Defendants'. Demurrer filed in the Superior Court of Baltimore City and appearing in the appendix. In paragraph three, Defendants' Demurrer states:

> 3. The agreement referred to in the Declaration as to fee arrangement was dated July 26, 1966. At that time, the regulations as set forth in RULES GOVERNING THE PRACTICE OF ATTORNEYS AND AGENTS BEFORE THE INTERNAL REVENUE SERVICE prohibited wholly contingent fees unless the taxpayer was indigent, and prohibited partially contingent fees unless a minimum substantial retainer had been paid. In the instant matter, the Plaintiffs (Appellees herein) have requested a total fee of $38,497.65 in addition to a $7,500.00 retainer. It is submitted that, in comparing the $7,500.00 retainer to a contingent fee of $38,497.65, one must reach the conclusion that either the $7,500.00

retainer was not substantial or that the total fee of $45,997.65 is unconscionable. It is pointed out that under circular 230, as revised, of RULES GOVERNING THE PRACTICE OF ATTORNEYS AND AGENTS BEFORE THE INTERNAL REVENUE SERVICE, Section 1028, Fees, says that an unconscionable fee for representation of a client in any matter before the Internal Revenue Service is prohibited, thus rendering the alleged agreement between the Plaintiffs and Defendants (Appellants and Appellees herein) as void and unenforceable as illegal and against the public policy.

The Maryland Court of Appeals, on page eight of its opinion, also refers to the withdrawal of counsel and cites the April, 1969 letter as the only evidence of Court (see appendix, letter of April 29, 1969 to Mr. Milton Kirsner from Arnold Fleischmann and Samuel L. Silber), in order to raise a material issue; but there was also testimony by Mr. Jacob (direct testimony of Mr. Jacob in appendix on Summary Judgment proceeding), affidavit of Milton F. Kirsner of December 17, 1969 (see appendix) and supplemental affidavit of Arnold Fleischmann dated January 23, 1970 in paragraph 5C, set forth in the appendix and quoted as follows:

"C. Plaintiffs did withdraw in the wake of the untenable position in which Defendants placed them when Defendants sought to have them (Plaintiffs) repudiate the agreements which they had recommended favorably to Defendants and the Government. As ethical attorneys and accountants, Plaintiffs could hardly do otherwise." The Court of Appeals of the State of Maryland in its decision on page eight, once more referring to the decision of the United States Tax Court, states, 'Other than payment, the acceptance of performance and the signing of the Decree was the terminus of the contractual relationship'; however, not raising once again the argument of the Tax Court to accept and to promulgate such Decree, the alleged signature of

> Richard M. Han as the representative of the Government in the stipulated Decree decision of the Tax Court entered on July 1, 1969, would not appear to be his signature at all but simply his name, written by other than him, as indicated by the initials appearing immediately after his written name at the bottom of the said Tax Court of the United States decision, Docket No. 3400-68, Gem Realty, Inc., Petitioner v. Commissioner of Internal Revenue, Respondent. Such is the case on each and every decision of the said Court against the numerous Appellants in the Tax Court of the United States and is exemplified in appendix by certified copy of decision in Docket No. 3400-68. Such alleged signatures with the said initials also appear in the Appellees appendix to its Brief in the Court of Appeals of the State of Maryland decision from which we are appealing.

The application of the Federal question involved in the Fourteenth Amendment to the Constitution of the United States was raised in paragraph five, page 22, of Appellant's Brief in the subject case in the Court of Appeals of Maryland at the end of said paragraph on page 24 of Appellant's Brief (see appendix).

Appellants' objection to the Motion for Summary Judgment is not only set out in the docket entries of the lower Court, that is, the Superior Court of Baltimore City, said Docket entries appearing in the appendix, as set out in Defendant's answers to Plaintiffs' Motion for Summary Judgment and affidavit filed therein and noted on the Docket entries on December 18, 1969, but is set out throughout the Appellants' Brief submitted to the Court of Appeals of the State of Maryland.

Implicit in the Answer in the lower Court of the Defendants (Appellants herein) answers to Plaintiffs (Appellees herein) Motion for Summary Judgment and the affidavit filed therein, together with the argument thereafter in open Court, (said arguments are set forth in the appendix) and together with the Appellants' Brief filed in the Court of

Appeals of the State of Maryland, strongly arguming against the Motion for Summary Judgment, is the right of trial by jury afforded a citizen under the Seventh Amendment of the Constitution of the United States. In reference to Appellants' contentions involving the Seventh Amendment of the Constitution of the United States, it is significant that in the opinion of the Court of Appeals of the State of Maryland on pages six and seven, the said Court of Appeals makes numerous mentions to the decision of the Tax Court of the United States. On page six, the Court of Appeals is quoted as follows: "Had we the benefit of a final decision upholding the Tax Court decree, it would be a simple matter to invoke the rule announced in *Cox v. Maryland Elec. Rwys. Co.*, 126 Maryland 300, 304, 95 A. 43 L.R.A. 1917 A. 270 (1915) that ordinarily a judgment by consent, having been enrolled "under the eye and with the sanction of the Court . . . should be considered as a judicial act not opened to question or controversy in any collateral proceeding . . .". *See also Freeman on Judgments, supra,* Sec. 1352. Appellants have already noted, *supra,* Freeman on Judgments, that such a Consent Judgment can in fact be attacked collaterally in jurisdictional considerations. On page seven of the Opinion of the Court of Appeals of Maryland, we quote: "We detect no problem, however, with the fact that the appeal from the denial of the Motion to Vacate is still pending for Kirsner has offered no legal or logical theory as to why the vacation of the Consent Decree would have any necessary effect on the acceptance of the performance which served as a basis for that Decree. Indeed he has never attempted to deny the critical fact of his acceptance." By this statement, the Court of Appeals once again is referring to the Decree of the United States Tax Court presently on Appeal before the Fourth Circuit Court of Appeals of the United States, Richmond, Virginia. Appellants have already argued above citing Title 26 of the United States Code, Section 6213(d) indicating the significance of a decision by the Fourth Circuit Court of Appeals of the United States in overruling said stipulated Decrees. On page eight of the

Decision of the Court of Appeals of Maryland, the Court is quoted as follows: "Other than payment, the acceptance of performance and the signing of the Decree was the terminus of this contractual relationship; . . ." By such quotation, the Court of Appeals of the State of Maryland once again incorporates the stipulated decree of the Tax Court of the United States. As above argued, the overruling of the said decision of the United States Tax Court of said stipulated Decrees would make any tax saving alleged a mere fiction. These said many references and dependence upon the stipulated Decrees of the United States Tax Court bring into the Court's opinion a specific Federal question, making the Seventh Amendment of the Constitution of the United States applicable.

CONCLUSION

Appellants pray for allowance of the Writ of Certiorari, contending that the State Court had decided a Federal question of substance and that the State Court has decided a case based on Decrees of the United States Tax Court, which Decrees have not been finally litigated, but are presently before a United State Circuit Court of Appeals, the State Court arbitrarily basing its decision on Federal tax deficiencies and penalties not yet finally determined by the Federal Court. In addition, Appellants contend that the United States Tax Court lacks jurisdiction and therefore the State Court's decision is reversible error by virtue of its lack of jurisdiction incidental thereto.

Respectfully submitted,

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AFFIDAVIT OF MILTON F. KIRSNER

STATE OF MARYLAND:

TO WIT:

CITY OF BALTIMORE:

MILTON F. KIRSNER, being duly sworn according to law, deposes and says that:

1. Except as otherwise appears, he makes this affidavit on the basis of his personal knowledge, and where he does not have personal knowledge of the facts stated such facts, nevertheless, true to the best of his knowledge; information and belief.

2. That he is one of the Defendants in the above-captioned matter.

3. That the remaining twenty (20) Defendants are corporations, each of which the aforesaid Milton F. Kirsner is the president and authorized on behalf of each said corporation to make affidavit on behalf of them; and that in both his individual and corporate capacities he is competent to testify.

4. That the said Milton F. Kirsner never promised as alleged, nor was indebted as alleged.

5. That prior to the filing of the Plaintiffs Declaration in this matter, the Defendant, Milton F. Kirsner, in behalf of the Defendants, engaged the services of Felix Jacob, Esquire, in order to further pursue his remedies in the Tax Court of the United States regarding the matter for which the Plaintiffs allegedly performed their services and seek fees in the instant suit.

6. That said matter is presently pending and has not yet reached a final determination. That your defendants have therefore been obliged to pay and become further obligated for additional legal services in order to arrive at a final determination of the tax matter mentioned.

7. That your Affiant did receive the letter, a copy of which is attached to Defendants' Answer to Plaintiffs'

Motion for Summary Judgment, and marked as Defendants' exhibit II. Which said letter indicated that the Plaintiffs in this matter had voluntarily terminated their services of the Defendant, and further instructed him to engage other counsel to further pursue his remedies to a final determination which the Defendants have now done.

8. That as shown in the Order of the United States Tax Court, attached as Defendants' exhibit I, the Plaintiffs have had their appearance struck from the matter for which they were representing the Defendants; and that further that, as evidenced by the aforementioned Order, the new counsel engaged by the Defendants is presently actively pursuing Defendants' remedies and that the matter is still pending and has not as yet reached a final determination.

9. That during the time that the Plaintiffs were performing the services alleged for the Defendants, your Affiant repeatedly urged the Plaintiffs to approach the matter in a manner which would reserve the separate corporate entity concept so important to the Defendants; and that the Plaintiffs regarded the said instructions, and proceeded to negotiate the matter on a basis of separate corporate deficiency. That certain of the Defendant corporations, namely REGENCY REALTY, INC., THE "516" INC., and JADE REALTY, INC., named as Defendants in the Plaintiffs' action were never assessed with tax deficiencies by the Internal Revenue Agent's report.

10. That the Defendants never engaged directly or indirectly with any arrangements with the Plaintiffs Samuel Silber, nor were the Defendants ever consulted with as to whether or not they were agreeable to employing Samuel Silber to perform any services for them.

11. That the Defendants in this matter are each separate and distinct corporate entities; and that the Defendants have never been advised by the Plaintiffs as to what, if any, claims for services the Plaintiffs are making against each of the individual Defendants.

12. That the Defendants allege and believe that the fee requested by the Plaintiffs in unreasonably high for the services rendered.

/s/ Milton F. Kirsner,
Individually and on behalf
of each of the Defendant
corporations

Subscribed and sworn to this 17th day of December, 1969.

/s/ Russell Jay Bennett
Notary Public

LAW OFFICES
FISHER & FLEISCHMANN
* * *

April 29, 1969

Mr. Milton Kirsner
516 St. Paul Street
Baltimore, Maryland 21202

Re: *Linden Holding Company, et al, v. United States*

Dear Milton:

In view of the attitude evidenced by you at the recent meeting in Mr. Silber's office on Tuesday, April 22, 1969, we have reviewed our position as counsel on your behalf and on behalf of all the various corporations whose income tax

returns have been examined and reports prepared by an agent of the Internal Revenuw Service. His findings are now pending for hearing before the Tax Court of the United States.

Over a period exceeding thirty months, we have diligently reviewed the facts and issues of law in these cases, made independent determinations of indicated deficiencies in taxes, penalties and interest, and have represented you vigorously before the representatives of the Internal Revenue Service at the various administrative levels, and, most recently, before the General Counsel's office of the U.S. Treasury Department. We are fully cognizant of your illness, which has extended over many years, and we have endeavored, with considerable patience and understanding, to communicate to you our findings and recommendations. On some occasions you have evidenced a comprehension of the very serious financial hazards that would be encountered in a trial of the pending cases and the advantages accruing to your companies by aggregating income and losses for each annual period, not only for the years before the Court but the subsequent years in which the issues are similar and which undoubtedly will be the subject of future litigation.

We have, at your request, met with members of your family who are members of the Bar, for the purpose of soliciting their views on the advisability of accepting the negotiated settlement in the light of all the facts, including your required testimony as a witness.

Since, unfortunately, you have exhibited an abhorrence at the mere suggestion of an aggregation of the income and losses of the various corporations because of the connotation of "consolidation" or "merger" which you, as an attorney, are aware cannot be accomplished except in accordance with Maryland corporation law, we are unable to effect a settlement and disposition of these cases on a basis which takes account of the clear and plain regulatory provisions of the U.S. Internal Revenue Code covering affiliated or related corporations, sometimes referred to as "multiple" corporations.

Notwithstanding your intransigence, we have been able to secure a written proposal of settlement of these cases by the Appellate Officer, Mr. Mueller, a copy of which has been furnished you and which discloses net deficiencies in taxes and penalties of $172,050.02, compared to the net deficiencies of $346,399.82, as shown in the agent's report dated June 29, 1966.

We cannot, of course, compel you to accept any proposed settlement which is acceptable to the Internal Revenue Service. Although we consider the settlement to be not only eminently reasonable and fair to you and in your very best interest, it is your right to determine whether or not you wish to accept it. However, our written contingent fee arrangement contemplates that the savings in taxes, penalties and interest on which it is based, are those which could be obtained regardless of your ultimate acceptance. If the savings afforded by Mr. Mueller's written settlement proposal are not acceptable to you, your refusal cannot affect the agreed fee which we have earned in this matter. We are, therefore, submitting our bill for services based on the letter dated July 26, 1966, a copy of which is attached. We are prepared to advise the Clerk of the U.S. Tax Court to strike our appearance as counsel, and you will be free to engage other counsel to represent you before the Tax Court. We will cooperate with your new counsel, to the fullest extent possible, including making available to him all of our records, providing, of course, you have theretofore paid our bill in full.

So that you are aware of our firm resolve in this matter, please be advised that unless payment or arrangement for payment is made within fifteen (15) days from the date of this letter, we will take whatever court action we deem necessary to protect our interest.

This entire matter has been reviewed with Mr. Myer Sigel and Mr. Bernard Felcher, who are in full accord with the contents of this letter.

Very truly yours,

/s/ Arnold Fleischmann

/s/ Samuel L. Silber

AF:cac
Enclosures

[R. 31-39]

[Filed Jan. 2, 1970]

SUPPLEMENTAL AFFIDAVIT OF ARNOLD FLEISCHMANN

I HEREBY CERTIFY that on this 23rd day of January, 1970, before me the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared ARNOLD FLEISCHMANN, one of the Plaintiffs herein, who is competent to testify to the matters hereinafter set forth and makes oath on personal knowledge as follows:

1. A. Affiant files herewith as Plaintiffs' Supplemental Affidavit Exhibit A, a photocopy of the following described document which is prayed to be considered a part of this Affidavit to the same extent as if its contents were set forth verbatim herein:

> Decision of the Tax Court of the United States dated July 1, 1969, in the case of Regency Realty, Inc., Petitioner v. Commissioner of Internal Revenue, Respondent, (Docket No. 3388-68) and Stipulation thereon executed on behalf of Petitioner by Milton F. Kirsner, President and on behalf of Respondent by Richard M. Hahn, acting Chief Counsel of IRS.

B. Similar documents were filed in sixteen (16) companion cases for the Defendants, Prince Realty, Inc. (Docket No. 3389-68); Jewel Realty, Inc. (Docket No. 3390-68); The Great United Realty Company, Inc. (Docket No. 3391-68); The Ideal Realty Company (Docket No. 3392-68); The Victory Holding Company (Docket No. 3393-68); Topaz Realty, Inc. (Docket No. 3394-68); Platinum Realty, Inc. (Docket No. 3395-68); Opal Realty, Inc. (Docket No. 3396-68); The Sunrise Realty Company (Docket No. 3397-68); Security Realty Company, Inc. (Docket No. 3398-68); The Sunshine Realty Company (Docket No. 3399-68); Gem Realty, Inc. (Docket No. 3400-68); Free State Realty Company, Inc.

(Docket No. 3401-68); Citation Realty Company, Inc. (Docket No. 3402-68); Diamond Realty, Inc. (Docket No. 3403-68); and The Linden Holding Company (Docket No. 3404-68). Photocopies of the Decisions of the Tax Court of the United States and the Stipulations thereon signed by Mr. Kirsner, as President of the applicable Corporations, in all of the above cases (Dockets No. 3389-68 through 3404-68) are available for perusal by the Court. To avoid undue cluttering of the record, they are not being filed as Exhibits with this Affidavit.

2. As will appear from said Exhibit A and all of the other sixteen (16) Decisions and Stipulations, each Decision sets forth an "agreement of the parties" with respect to certain deficiencies in income taxes and/or additions to taxes due. Each Decision is signed by Honorable Samuel H. Sterrett, Judge of theTax Court of the United States.

As will further appear from said Exhibit A and all of the other sixteen (16) Decisions and Stipulations, each Stipulation was *signed by Milton Kirsner,* as President of the applicable Corporations, and Richard M. Hahn, acting Chief Counsel–Internal Revenue Service, on behalf of the Government. Each Stipulation provides that "the Court may enter the foregoing Decision in the above-entitled case," and further provides:

> "It is further stipulated that, effective upon the entry of this decision by the Court, Petitioner waives the restrictions, if any, contained in the applicable Internal Revenue laws on the assessment and collection of the deficiency in taxes and additions to the taxes, plus statutory interest."

3. A. As stated in Plaintiffs' Exhibit No. 2 attached to the Declaration, the aggregate amount of taxes, penalties and interest claimed by the Government in its (Agent's Report) Audit of June 29, 1966, is as follows:

Taxes and Penalties	$346,399.82
Interest thereon	108,324.70
	$454,724.52

B. As further stated in said Exhibit 2, the aggregate amount of taxes, penalties and interest which were actually assessed by the aforementioned seventeen (17) Decisions of the Tax Court of the United States is as follows:

Taxes and Penalties	$150,000.00
Interest thereon	48,073.51
	$198,073.51

C. As further stated in said Exhibit 2, the total savings in taxes ($454,724.52 less $198,073.51) was *$256,651.01.*

D. As further stated in said Exhibit 2, Plaintiffs' fee is fifteen (15%) per cent of $256,650.01 or $38,497.65.

4. Contrary to the statements contained in the Defendants' Answer to Plaintiffs' Motion for Summary Judgment, it is abundantly clear from Plaintiffs' Supplemental Affidavit Exhibit A, and all of the other sixteen (16) Decisions and Stipulations, that each of said seventeen (17) cases was *determined finally* by Judge Sterrett's Decision "pursuant to agreement of the parties." Included in each case was a Stipulation signed by Mr. Kirsner, as President of the applicable Corporations, and the acting Chief Counsel of the Internal Revenue Service. Accordingly, it is untrue as stated in paragraph 7 of Defendants' Affidavit that "Plaintiffs had voluntarily terminated their services of the Defendant (sic) . . . and further instructed him (sic). . .to engage other counsel to further persue his . . . (sic) . . . remedies to a final determination which the Defendants have now done." Succinctly stated, *Defendants had actually entered into a binding agreement with the Government, all seventeen (17) cases were closed, and there were (and are) no further remedies to pursue.* Therefore, Plaintiffs have performed their agreement with Defendants and are entitled to payment of their fees pursuant to the provisions of Plaintiffs' Exhibit No. 1, attached to the Declaration, which provides that Plaintiffs "will be paid the sum of Seven Thousand Five Hundred ($7500.00) Dollars in retainer fees *and fifteen (15%) percent of all savings on taxes, penalties,*

and interest resulting to these Corporations and to me (Milton Kirsner) . . . when compared to the audit dated June 29, 1966." (underscoring supplied).

5. Further answering the statement in paragraph 7 of Defendants aforesaid Affidavit, wherein Defendants claim that Plaintiffs' letter dated April 29, 1969 (Defendants Exhibit II) "indicated that the Plaintiffs in this matter had voluntarily terminated their services of the Defendant, etc," Affiant says that such statement is completely untrue for the following reasons:

A. The Decisions of the Tax Court of United States filed on July 1, 1969, were based on stipulations entered after extended negotiations with the attorneys for the Internal Revenue Service. During this entire period which extended well beyond April 29th into July of 1969, Plaintiffs represented the Defendant corporations and Mr. Kirsner.

B. As will further appear from said Defendants' Exhibit II, Plaintiffs stated that they would withdraw as Defendants' counsel in the event of the latters' arbitrary refusal to submit to any reasonable settlement with the Government in these cases. *Actually Plaintiffs did not withdraw but participated in the conclusion of the seventeen (17) settlements to which Defendants agreed in writing.* In fact, Plaintiffs had not withdrawn from these cases as late as July 16, 1969, when Plaintiff, Samuel Silber wrote a letter to Defendant, Milton Kirsner. A copy of said letter is attached hereto, and marked "Plaintiffs' Supplemental Affidavit Exhibit B," and is prayed to be considered a part of this Supplemental Affidavit to the same extent as if its contents were set forth verbatim herein. In said letter, Plaintiff Samuel Silber advised Mr. Kirsner that Defendants would be billed by the Government for the tax deficiencies, and that payment of Plaintiffs' professional fees was anticipated pursuant to the contract in Plaintiffs' Exhibit No. 1 attached to the Declaration.

C. Plaintiffs did withdraw in the wake of the untenable position in which Defendants placed them when Defendants sought to have them (Plaintiffs) repudiate the agreements which they had recommended favorably to Defendants and the Government. As ethical attorneys and accountants, Plaintiffs could hardly do otherwise.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year aforesaid.

_____

Notary Public

/s/ Arnold Fleischmann

[R. 19-27]
[Filed Dec. 10, 1969]

ANSWER TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MILTON F. KIRSNER, ET AL, Defendants, by Bernard J. Sevel and Russell Jay Bennett, their attorneys, in Answer to the Plaintiffs' Motion for Summary Judgment say that there is a genuine dispute between the parties as to facts which are material to the Plaintiffs' claim as follows:

1. That the matter for which Plaintiffs' allegedly represented the Defendants and for which Plaintiffs now claim fees for said services, has not as yet reached final determination. That the matter is still pending before the Tax Court of the United States, Docket numbers 3388-68 thru 3404-68, inclusive. And as more particularly shown in a copy of the Order of the Honorable Samuel B. Sterrett, Judge of the Tax Court of the United States, said Order being attached hereto and marked as Defendants' exhibit I.

2. That prior to the filing of the Plaintiffs' Motion for Summary Judgment, Plaintiffs had voluntarily terminated their representation of the Defendants to the end that the Defendants were obliged to obtain their counsel in order to pursue the case to a final determination before the Tax Court of the United States; and that the Defendants, in order to obtain this representation were obliged to pay a substantial fee to said attorney who is now representing them in this matter.

That Defendants filed a Motion with the Tax Court of the United States withdrawing their appearance as counsel for the Defendants; which said Motion was granted by the Order attached hereto and marked as Defendants' exhibit I.

That the Plaintiffs caused a letter dated April 29, 1969, to be directed to the Defendants, indicating their intention to disassociate themselves from further representation of the Defendants in this matter; and further suggesting to the Defendants that they engage other counsel which the Defendants have done. A copy of said letter is attached hereto, and marked as Defendants' exhibit II.

3. In that the Plaintiffs' terminated their representation of the Defendants as aforementioned, they are not entitled to a fee based on the contingencies as set forth in their claim. It becomes a matter of determination by the Court as to what, if anything, the Plaintiffs are entitled to for their services rendered prior to the termination as alleged.

4. That the Defendants allege that in view of the pendency of the tax matter as aforementioned that there has been no accomplished tax savings at the present time, and that the matter as brought by the Plaintiffs is premature.

5. That the Plaintiffs functioned jointly in the capacity of accountant and attorney and that the Plaintiffs have evidenced this combined practice in the manner in which their Motion for Summary Judgment was brought; namely a single combined claim for damages: that was set forth

in the Memorandum filed in conjection with the Defendants' Demurrer, said combined practice is contrary to public policy, and renders the Agreement upon which the Plaintiffs' action is brought, void.

6. That further, the Declaration fails to itemize the claims against each of the separate Defendants, but rather lumps their claims against the Defendants in an aggregate amount. That such failure to itemize said claims is a fatal defect which would prevent the granting of the Plaintiffs' Motion for Summary Judgment.

7. That certain of the Defendants, namely REGENCY REALTY, INC., THE "516" INC., and JADE REALTY, INC., are improper parties to the suit in that they had no tax deficiency determined by the Internal Revenue Agent's report, and consequently there was nothing that the Plaintiffs did to effect any savings as to them.

8. That there was no privity of contract between the Defendants and the Plaintiff SAMUEL L. SILBER, in that the letter upon which the Plaintiffs rely as the basis of their suit fails to indicate that the Defendants employed the said SAMUEL L. SILBER and further that the Plaintiffs' suit indicates that he was, in fact, retained by the other Plaintiffs without the knowledge or the consent of the Defendants.

9. That the Defendants allege that the fees requested by the Plaintiffs, in view of the aforegoing, are unreasonable high and are therefore unconscionable and contrary to the rules governing the practice of attorneys and agents before the Internal Revenue Service, Section 10.28.

10. In support of this Answer, there are filed herewith:

(1) Copy of Order of Tax Court of the United States, dated November 19, 1969. (Marked as Defendants' exhibit I)

(2) Copy of letter from Messrs. Arnold Fleischmann and Samuel Silber, addressed to Mr. Milton F. Kirsner.

one of the Defendants herein, dated April 29, 1969. (Marked as Defendants' exhibit II)

(3) Affidavit of Milton F. Kirsner.

WHEREFORE, the Defendants pray:

1. That the Plaintiffs' Motion for Summary Judgment be denied.

2. For such other and further relief as the nature of their cause may require.

/s/ Bernard J. Sevel
/s/ Russell Jay Bennett
Attorneys for Defendants

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1970

No. 297

MILTON F. KIRSNER, et al.,

Appellants,

v.

ARNOLD FLEISCHMANN, et al.,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY
(*Joseph C. Howard, Judge*)

APPELLANTS' BRIEF

STATEMENT OF THE CASE

Lawyers and accountants sued former clients and claimed contingent fees from income tax cases. The Superior Court of Baltimore City (Howard, J.) entered summary judgment for $40,276.93 in favor of all plaintiffs against all defendants and defendants appealed.

Appellants are an individual ("Kirsner") and twenty corporations of which he is president. Appellees are lawyers ("Fleischmann" and "Silber"), accountants ("Sigel" and "Felcher"), or both ("Silber").

On September 25, 1969 appellees filed in the lower court their nar. and motion for summary judgment, supported by Fleischmann's affidavit and two exhibits. Exhibit No. 1 was a letter from Kirsner to Fleischmann, dated July 26, 1966, claimed by appellees to constitute their employment and fee contract. Exhibit No. 2 was a statement setting out appellees' claimed contingent fee, said therein to total $38,487.65, based on 15% of alleged tax savings of $256,-651.01. The nar. contained two common counts, one for work done and one on account stated, and a special count declaring on the Kirsner letter.

On October 24, 1969 appellants appeared in the case and interposed a demurrer. On November 17, 1969 the lower court overruled the demurrer. On December 18, 1969 appellants answered the motion for summary judgment and filed in support of their answer and in opposition to the motion two exhibits and an affidavit of Kirsner. Exhibit No. 1 was an order of the Tax Court of the United States entered on November 19, 1969 in seventeen cases brought by some of the corporate appellants against the Commissioner of Internal Revenue concerning the same income tax matters for which appellees claimed their contingent fee. Exhibit No. 2 was a letter written to Kirsner by Fleischmann and Silber on April 29, 1969.

Thereupon, on January 2, 1970, appellees filed a supplemental affidavit of Fleischmann and two more exhibits. Exhibit A was a decision entered on July 1, 1969 by the Tax Court in one of the seventeen cases referred to in appellants' earlier exhibit. Exhibit B was a letter from Silber to Kirsner dated July 16, 1969.

On March 30, 1970, as an adjunct to a motion ne recipiatur directed at a memorandum submitted by appellees, appellants filed a further affidavit in the form of a

letter from Felix S. Jacob, a lawyer then acting for the interested corporate appellants in the Tax Court cases, to Bernard J. Sevel, one of appellants' lawyers below. The letter was sworn to by Jacob. It dealt with his representation of some of the corporate appellants in the Tax Court cases when Fleischmann and Silber withdrew and with the status of those cases at that time and on the date of his letter, March 24, 1970.

On April 2, 1970 the lower court held a hearing on the motion for summary judgment. At that hearing appellees put in evidence seventeen similar decisions of the Tax Court, each dated July 1, 1969, entered in the separate cases brought by seventeen of the corporate appellants against the Commissioner of Internal Revenue. Appellees also put in evidence Kirsner's letter to Fleischmann of July 26, 1966, i.e. the alleged employment and fee contract. Silber's letter to Kirsner of July 16, 1969 and Kirsner's answer were ordered admitted as agreed exhibits. Appellants presented Jacob's testimony as to his activities in the Tax Court cases after Fleischmann and Silber withdrew and as to the then current status of those cases.

Thereupon the lower court on June 9, 1970 filed a memorandum opinion announcing it would grant the motion for summary judgment and on June 12, 1970 made an order entering summary judgment in favor of all plaintiffs against all defendants for $40,276.93. From that order appellees on July 8, 1970 appealed here.

QUESTION PRESENTED

Whether under the pleadings, affidavits, exhibits and testimony the lower court erred in finding that there was no genuine dispute as to any material fact and that all plaintiffs below were entitled to judgment as a matter of law against all defendants for $40,276.93.

STATEMENT OF FACTS

The salient circumstances appearing from the pleadings, affidavits, exhibits and testimony relied upon by the parties to establish their respective factual contentions in support of or in opposition to the motion for summary judgment are as follows:

Appellee Fleischmann is a lawyer, appellees Sigel and Felcher are accountants and appellee Silber is a lawyer and an accountant (E. 4). Appellant Kirsner is president of each of the twenty corporate appellants (E. 20).

Sigel and Felcher, as accountants, and Fleischmann, as lawyer, "were retained by or on behalf of" (E. 4 (Declaration)) appellees "to render certain professional services to them, as more particularly set forth in a letter dated July 26, 1966, from 'Milton F. Kirsner, Individually, and on behalf of said Corporations', to Fleischmann" (Id.). The letter, identified in the Declaration as Plaintiffs' Exhibit No. 1, said (E. 6-7):

> "Arnold Fleischmann, Esq.
> Sun Life Building-Charles Center
> Baltimore, Maryland 21201
>
> Re: 516, Inc., et al.
>
> Dear Mr. Fleischmann:
>
> This letter is to confirm our oral understanding authorizing you to act as attorney on my behalf and on behalf of each of the corporations, listed on the schedule attached (of each of which I am the president and the officer authorized to act), in connection with the income tax problem and Internal Revenue Service audit dated June 29, 1966, jointly with Myer Louis Sigel and Bernard Felcher, my accountants.
>
> You will be paid the sum of Seven Thousand Five Hundred Dollars ($7500) in retainer fees and fifteen per cent (15%) of all savings on taxes, penalties and

interest resulting to these corporations and to me when compared to the audit dated June 29, 1966.

/s/ Milton F. Kirsner
Individually and on behalf of
said corporations"

Appellees contend and allege that "with Kirsner's consent, on his behalf and on behalf of all of the corporate Defendants, Fleischmann retained Silber, a CPA and Attorney, as co-counsel at no additional expense to any of the Defendants" (E. 4 (Declaration)). Appellants contend and reply, in Kirsner's affidavit in support of their answer to the motion for summary judgment,

> "10. That the Defendants never engaged directly or indirectly with any arrangements with the Plaintiffs Samuel Silber, nor were the Defendants ever consulted with as to whether or not they were agreeable to employing Samuel Silber to perform any services for them." (E. 21)

Appellees contend and aver in their declaration and in Fleischmann's affidavit that they "accomplished savings on taxes on Defendants' behalf in the sum of $256,651.01 as set forth on Plaintiffs' Amended Statement for Professional Services Rendered dated September 4, 1969" (E. 4) (a copy of which is attached to the declaration as Plaintiffs' Exhibit No. 2 (E. 7-8)) and that "Defendants owe Plaintiffs the sum of $38,497.65 for the services therein enumerated in accordance with the agreed formula set forth in Plaintiffs' Exhibit No. 1" (E. 5), with interest from September 4, 1969, the date of the statement (E. 5). (Fleischmann, in his affidavit filed in support of the motion for summary judgment, in effect simply swears to the allegations of the special count and that the money claimed by appellees "is justly due and owing" (E. 6).)

Appellants contend, on the same issues, and state in their answer to the motion for summary judgment and in the exhibits and Kirsner's affidavit in support of their answer, that the tax matters for which appellees claim fees had not

been concluded, but were still pending before the Tax Court (E. 13 (Answer to Motion for Summary Judgment, paragraph 1); E. 15-16 (Order of Tax Court of the United States dated November 19, 1969); E. 20 (Affidavit of Kirsner, paragraphs 5, 6, 7 and 8); E. 52-53 (Affidavit of Jacob); E. 41, 44-46 (Testimony of Jacob)), and that appellees had voluntarily terminated their representation of appellants, had withdrawn from the pending Tax Court cases and had hence obligted appellants to employ and pay other counsel, viz. Jacob, to complete the same matters for which appellees now sought fees (E. 13 (Answer to Motion for Summary Judgment, paragraphs 2, 3 and 4); E. 15-16 (Order of Tax Court of the United States dated November 19, 1969); E. 18-19 (Letter from Fleischmann and Silber to Kirsner dated April 29, 1969); E. 20 (Affidavit of Kirsner, paragraphs 5, 6, 7 and 8); E. 45-46 (Testimony of Jacob); E. 52 (Affidavit of Jacob)). (Appellants also point out that Fleischmann and Silber actually testified for the Government, as witnesses adverse to the interested appellants, at the Tax Court hearing on November 19, 1969 (E. 46 (Testimony of Jacob); E. 52 (Affidavit of Jacob)).)

Appellants contend further, on the same issues, and state in their pleadings and affidavits that Regency Realty, Inc., The "516" Inc. and Jade Realty, Inc., three of the corporate appellants, were not charged with any tax deficiencies and appellees hence did nothing with respect to them (E. 14 (Answer to Motion for Summary Judgment, paragraph 7); E. 19 (Affidavit of Kirsner, paragraph 9)). Appellants also say that there was no contractual relationship between them and Silber, that they did not employ him or consent to his employment by Fleischmann (E. 14 (Answer to Motion for Summary Judgment, paragraph 8); E. 21 (Affidavit of Kirsner, paragraph 10)).

Appellants contend and state that the fees sought by appellees "are unreasonably high and are therefore unconscionable and contrary to the rules governing the practice of attorneys before the Internal Revenue Service, Section 10.28" (E. 15 (Answer to Motion for Summary Judgment,

paragraph 9)) and that "Defendants allege and believe that the fee requested by the Plaintiffs is unreasonably high for the services rendered" (E. 21 (Affidavit of Kirsner, paragraph 12)).

Appellants say that at their insistence the tax matters in issue were treated by appellees "in a manner which would reserve the separate corporate entity concept so important to the Defendants" (E. 21 (Affidavit of Kirsner, paragraph 9)), but that they "have never been advised by the Plaintiffs as to what, if any, claims for services the Plaintiffs are making against each of the individual Defendants" (E. 21 (Affidavit of Kirsner, paragraph 11)). In their answer to the motion for summary judgment appellants also aver,

> "6. That further, the Declaration fails to itemize the claims against each of the separate Defendants, but rather lumps their claims against the Defendants in an aggregate amount. That such failure to itemize said claims is a fatal defect which would prevent the granting of the Plaintiffs' Motion for Summary Judgment," (E. 14)

Therein appellants also allege,

> "5. That the Plaintiffs functioned jointly in the capacity of accountant and attorney and that the Plaintiffs have evidenced this combined practice in the manner in which their Motion for Summary Judgment was brought; namely a single combined calim for damages: that was set forth in the Memorandum filed in connection with the Defendants' Demurrer, said combined practice is contrary to public policy, and renders the Agreement upon which the Plaintiffs' action is brought, void." (E. 14)

Appellees make further contentions on the same issues by asserting in Fleischmann's supplemental affidavit and by means of the exhibits attached thereto that each of the Tax Court cases had ended and that appellees had not voluntarily withdrawn therefrom. They contend that appellants' assertions to the contrary are untrue. They say that,

> "4. Contrary to the statements contained in the Defendants' Answer to Plaintiffs' Motion for Summary Judgment, it is abundantly clear from Plaintiffs' Supplemental Affidavit Exhibit A, and all of the other sixteen (16) Decisions and Stipulations, that each of the said seventeen (17) cases was *determined finally* by Judge Sterrett's Decision 'pursuant to agreement of the parties.' Included in each case was a Stipulation signed by Mr. Kirsner, as President of the applicable Corporations, and the acting Chief Counsel of the Internal Revenue Service. Accordingly, it is untrue as stated in paragraph 7 of Defendants' Affidavit that 'Plaintiffs had voluntarily terminated their services of the Defendant (sic) . . . and further instructed him (sic) . . . to engage other counsel to further pursue his . . . (sic) . . . remedies to a final determination which the Defendants have now done.' . . ." (E. 24 (Supplemental Affidavit of Fleischmann, paragraph 4))

and that,

> "5. Further answering the statement in paragraph 7 of Defendants' aforesaid Affidavit, wherein Defendants claim that Plaintiffs' letter dated April 29, 1969 (Defendants Exhibit II) 'indicated that the Plaintiffs in this matter had voluntarily terminated their services of the Defendant, etc.' Affiant says that such statement is completely untrue for the following reasons: . . ." (E. 25, Supplemental Affidavit of Fleischmann, paragraph 5)).

Appellants contend and assert through the testimony of Jacob and by means of his affidavit that the Tax Court cases had not ended. Jacob said, at the hearing below on the motion for summary judgment on April 2, 1970:

> "THE WITNESS: Your Honor, I now represent these corporation in matters involving a tax controversy that was before the Tax Court of the United States, which is currently sitting in Washington, D.C. In explanation of that there were Orders of the Court dated July 1, 1969, for various decrees relat-

ing to compromise settlement, (29) which had been agreed to and was ordered by the Tax Court of the United States. I was retained by Mr. Kirsner after that date.

Upon further conferences with Mr. Kirsner, there were timely motions filed for all seventeen corporations in the Tax Court of the United States. One is called a Motion for Leave to File a Motion to Vacate Decision. (E. 42 (Testimony of Jacob))

* * *

In connection with these seventeen cases, Mr. Fisher's statement about no rules of the Tax Court applying would be basically incorrect. The Tax Court, under Rule 19, allows you to file a motion to vacate the decision within 90 days.

In seventeen of these cases I entered my appearance as attorney for the corporations, and I filed motions timely to vacate the decision of the Tax Court.

Now, in the Tax Court to withdraw as attorney of record you must get their approval, and at a hearing (37) in November both Mr. Fleischmann and Mr. Silber, who were the prior attorneys for these corporations, appeared in Washington, D.C. and filed appropriate papers to withdraw their appearance as attorneys for the seventeen corporations, and the Judge granted their request, so that they were no longer attorneys for the corporations at the time I was the attorney. At that time, I was the sole attorney.

Motions were timely filed within the 90 days, as required by Rule 19. Following the filing of the motions, a hearing was set on the motions in Washington, D.C. on November 19, 1969. The hearing was set in front of Judge Samuel B. Sterrett, the same Judge who signed the original Orders. Up to the present time, even though it has been over four months, there has not been a determination of the Tax Court.

* * *

THE WITNESS: At the hearing on November 19, 1969, Mr. Kirsner was there to testify in person, and Mr. Silber and Mr. Fleischmann were called as adverse witnesses by the Government. There were medical reports proferred regarding the psychiatric condition of Mr. Kirsner. There were various legal arguments made and, as of now, we are waiting to hear from the Tax Court of the United States." (E. 45-46 (Testimony of Jacob))

The condition of Kirsner's health was alluded to earlier by Fleischmann and Silber. When they wrote to Kirsner on April 29, 1969 they said in part that,

". . . We are fully cognizant of your illness, which has extended over many years, and we have endeavored, with considerable patience and understanding, to communicate to you our findings and recommendations. . . ." (E. 17 (Defendants' Exhibit No. 1 to Answer to Motion for Summary Judgment))

And in a colloquy between the lower court and counsel at the hearing on the motion for summary judgment on April 2, 1970 the court remarked that,

". . . I have to consider any question about the mental aspect of Mr. Kirsner before deciding whether or not to grant this Motion for Summary Judgment, you understand." (E. 51)

In his affidavit (letter to Sevel written and sworn to on March 24, 1970) Jacob said:

"Pursuant to our recent conversation, I represent Milton Kirsner and several of his corporations who have matters pending before the Tax Court of the United States.

My services were engaged in September of 1969, and I have filed a Motion for Leave to File a Motion to Vacate Decision; Motion to Vacate Decision; and a Motion to Extend Time for all 17 corporations. Enclosed you will find copies of these Motions.

On November 19, 1969, these Motions were heard before the Honorable Samuel B. Sterrett, and he

allowed Arnold Fleischmann and Samuel Silber to withdraw their appearances as counsel of record. In addition Mr. Fleischmann and Mr. Silber were called as witnesses for the Government and testified on behalf of the Government on the hearing of November 19, 1969.

I am sending you a copy of an Order that was signed by Judge Sterrett vacating his oral decision to deny our Motions to Vacate.

* * *

As of the date of signature of this letter, the matter is still pending before the Tax Court of the United States." (E. 52-53 (Affidavit of Jacob))

On that state of the record, the lower court, having examined the pleadings, affidavits and exhibits filed and considered the testimony taken, found that no dispute existed as to any material fact and granted the motion for summary judgment.

ARGUMENT

A. THE PLEADINGS, AFFIDAVITS, EXHIBITS AND TESTIMONY RAISE MATERIAL ISSUES OF FACT AND SHOW THAT APPELLEES ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Appellants submit that the pleadings, affidavits, exhibits and testimony in this cause clearly show that there are genuine disputes between the parties as to material facts and that appellees are not entitled to judgment as a matter of law. The motion for summary judgment should hence have been denied.

In order to defeat the motion, appellants need only establish the existence of an issue of fact or the absence of entitlement to judgment as a matter of law. They need not make out a prima facie defense, nor prove any portion of their case. They need only present facts sufficient to show a genuine dispute between the parties as to any material

fact or to show that appellees are not entitled to judgment as a matter of law. Maryland Rule 610a.; *Tellez v. Canton Railroad Co.*, 212 Md. 423, 129 A.2d 809 (1957); *Roland v. Lloyd E. Mitchell, Inc.*, 221 Md. 11, 155 A.2d 691 (1959).

The function of the Court in respect to appellees' motion is strictly limited to determining the existence vel non of material issues of fact or, if the facts are undisputed, whether appellees were entitled to judgment as a matter of law. The Court cannot choose between conflicting affidavits or attempt to decide any issue of fact or credibility. It cannot weigh evidence. If the affidavits or other evidence properly before the Court show a genuine conflict as to any material fact, the motion must be rejected. *Tellez v. Canton Railroad Co., supra; White v. Friel*, 210 Md. 274, 123 A.2d 303 (1956). If on undisputed facts appellees are still not entitled to judgment as a matter of law, the same result must obtain. *Roland v. Lloyd R. Mitchell, Inc., supra.*

In determining the existence vel non of an issue of fact, doubts are to be resolved against the granting of summary judgment. The facts appearing from the record should be taken in the light most favorable to the party opposing the motion and he should be given the benefit of all favorable inferences which may reasonably be drawn in support of his contentions. And this is so even if facts are undisputed, if they are susceptible of more than one inference. *Blakeney v. United Ins. Co., Inc.* (D.C. Mun. App.), 87 A.2d 532 (1952); *Roland v. Lloyd R. Mitchell, Inc., supra; City of Baltimore v. Allied Contractors, Inc.*, 236 Md. 534, 204 A. 2d 546 (1964). The situation is analagous to a request for a directed verdict. *White v. Friel, supra.*

The pleadings, affidavits, exhibits and testimony before the Court clearly show the existence of genuine disputes as to material facts. Among such disputes are, for example, bona fide factual conflicts, established by the record, as to: (1) the meaning, operation, effect and even the validity vel non of the alleged contingent fee contract which appellees claim is established by the Kirsner letter to Fleischmann of

July 26, 1966; (2) whether the Tax Court cases had been concluded; (3) whether appellees or such of them as were employed by appellants abandoned their employment; (4) whether any express contractual relationship or any privity at all existed between appellants and appellee Silber (or between appellants and Sigel or Felcher, for that matter); (5) whether any obligations sought to be imposed upon appellants to pay contingent fees were joint or several, and if the latter, the extent to which each appellant is obliged; and (6) whether the measure of such supposed obligation, under the facts of this cause, is the percentage formula contained in Kirsner's letter, or quantum meruit. Any one of the several issues made by the record should in itself suffice to defeat the motion for summary judgment.

1. The Alleged Contingent Fee Contract Is in Itself Sufficiently Ambiguous To Prevent Entry of Summary Judgment. Extrinsic Evidence Is Required To Determine the Intention of the Parties. Whatever Such Evidence There Is in the Record Raises Material Issues of Fact.

Material issues of fact arise out of the contingent fee contract itself. (See Kirsner's letter to Fleischmann dated July 26, 1966, which sets out that alleged contract. (E. 6-7)) It is thoroughly ambiguous in its terms, or lack of terms. A genuine dispute hence arises out of its mere presence in the pleadings.

It fails to state the nature, extent, or duration of appellees' undertakings. It does not described when any contingent fee is to be paid, or when such fee shall become due or payable. It does not define when the "savings on taxes, penalties and interest resulting to these corporations and to me" (E. 6) which is said to be the basis for contingent fees shall be deemed to have "resulted". It does not set out any standard or offer any guide by which time of payment can reasonably be determined. Is any contingent fee

payable thereunder due, for instance, before or after conclusion of the Tax Court cases referred to in the record? Or are such fees perhaps due whenever any offers which might conceivably result in savings are obtained, regardless of ultimate outcome or acceptance by appellants, as appellees seem prone to consider? (See Fleischmann's and Silber's letter to Kirsner of April 29, 1969 (E. 18).)

On the face it runs only to Fleischmann. It is certainly addressed only to him (E. 6). It purports to authorize him "to act as attorney" "in connection with the income tax problem" "jointly with Myer Louis Sigel and Bernard Felcher, my accountants" (E. 6), but it makes no provisions for accountants' fees. It says only to Fleischmann, as lawyer, "(y)ou will be paid" (E. 7) the retainer and contingent fees referred to in the letter.

Its terms are certainly susceptible of more than one meaning. Extrinsic evidence is hence required to determine the intention of the parties. Whatever such evidence there is in the record is in conflict. Appellants, for instance, say that no contingent fees are payable until after conclusion of the Tax Court cases. Appellees indicate that they think such fees are payable whenever an offer of settlement is obtained, whether or not appellants accept such offer. Summary judgment should hence not have been granted. An evidentiary hearing should have been afforded the parties to determine their real intentions with respect to those material points which are vague, doubtful or susceptible of more than one meaning as expressed in the contract letter. *Cf. Coopersmith v. Isherwood*, 219 Md. 455, 150 A.2d 243 (1959); *Cadem v. Nanna*, 243 Md. 536, 221 A.2d 703 (1966); *Lawless v. Merrick*, 227 Md. 65, 175 A.2d 27 (1961); *City of Baltimore v. Allied Contractors, Inc.*, 236 Md. 534, 204 A.2d 546 (1964).

(a) *Serious issues are raised by the record as to the validity of the contract and as to whether the contingent fee claimed is unconscionable in the circumstances. These issues also require a full evidentiary hearing and militate against the granting of summary judgment.*

The contract in issue is one between an attorney (Fleischmann) and his clients. The clients, appellants, charge in their pleadings that the fees sought by the lawyer are "unreasonably high" and "unconscionable" (E. 15) and "unreasonably high for the services rendered" (E. 21). Appellees on the record make no direct reply to those charges, but simply say that appellants ought to be bound by their alleged agreement.

Ordinarily in disputed transactions between attorney and client the burden to show fairness is upon the attorney and in determining whether the attorney has discharged that burden the court must consider all relevant facts and circumstances in the particular case. See *Baker v. Otto*, 180 Md. 53, 22 A.2d 924 (1941), and *Hardy v. Brookhart*, ___ Md ___, ___ A.2d ___, Baltimore Daily Record, November 9, 1970 (decided October 10, 1970). This is so especially perhaps where the client suffers from some infirmity. (*Cf. Hughes v. McDaniel*, 202 Md. 626, 98 A.2d 1 (1953) where the client was a heavy drinker.)

In the instant cause the record discloses uncontradicted evidence that Kirsner suffered from "illness, which has extended over many years" (E. 17), in the words of Fleischmann and Silber in their letter written to Kirsner on April 29, 1969. Moreover, Jacob testified concerning "medical reports proffered" (E. 45) at the Tax Court hearing on November 19, 1969 "regarding the psychiatric condition of Mr. Kirsner" (E. 45). And the lower court spoke of the necessity for considering "any question about the mental aspect of Mr. Kirsner" (E. 51) before deciding the motion for summary judgment. All these aspects militate in favor of affording appellants a full evidentiary hearing to determine the propriety of a disputed transaction between

attorney and client and against the granting of summary judgment.

Appellants in their pleadings also contend that the fee sought was "contrary to the rules governing the practice of attorneys before the Internal Revenue Service, Section 10.-28" (E. 15). This uncontradicted factual averment ought also to have been aired at an evidentiary hearing and not disposed of summarily on a motion for judgment.

Appellants in their pleadings and affidavits raise issues as to the legality of a fee arrangement which, if the Kirsner letter is allowed the interpretation that appellees seek to put upon it, i.e. that it is an agreement with Fleischmann, Sigel, Felcher and even Silber to pay a single combined fee to lawyers and accountants for joint services, appellants say not only contemplates fee splitting between attorneys and laymen, in this instance accountants, but encourages the dual practice of law and accounting and is hence contrary to public policy and void. Those issues also require for their proper resolution a full evidentiary hearing and constitute additional reasons why summary judgment should have been refused.

2. The Record Raises a Material Issue of Fact as to Whether or Not the Tax Court Cases Had Been Completed.

A genuine dispute as to a most material issue of fact arises from the record with regard to whether or not the Tax Court cases had been completed when appellees asserted their contingent fee claim. It is quite clear that those cases involved or were the same matters for which appellees claimed their fees. They were at the very heart of the thing which appellees say they were hired to do. No "savings on taxes" (E. 7) could be construed as "resulting" (E. 7) until those cases ended. Under any theory of the claimed contingent fee arrangement which appellees may espouse they must first complete their contractual obligations before

becoming entitled to claim the contract price. Hence if appellants' affidavits or other appropriate papers present facts, or support reasonable inferences, to show that the Tax Court cases had not been concluded, the Court would seem to be compelled to deny the motion for summary judgment.

To present such facts and to support such inferences, appellants filed their answer to motion for summary judgment, the order of the Tax Court dated November 19, 1969, the affidavit of Kirsner, the affidavit of Jacob and the testimony of Jacob at the hearing on the motion on April 2, 1970. That the November 19, 1970 order of the Tax Court, for instance, is evidence of the fact that the Tax Court cases were then still pending, or that it at the very least supports a reasonable inference to that effect, would seem to be beyond question. The order *says* that the cases are still open. It provides for written briefs to be filed with regard to pending motions mentioned in the order (E. 16). It clealry contemplates future proceedings. The affidavit of Jacob, then attorney for appellants in those cases, also says that the cases are still open. "As of the date of signature of this letter (March 24, 1970), the matter is still pending before the Tax Court of the United States" (E. 53; words in parentheses supplied). And in his testimony on April 2, 1970 Jacob said with respect to the November 19, 1970 Tax Court hearing, "There were various legal argument made and, as of now, we are waiting to hear from the Tax Court of the United States." (E. 46).

The instant case was commenced by appellees filing their declaration in the lower court on September 25, 1969. Their rights with respect to the subject matter of their suit were fixed as of that date. It is apparent that evidence is presented by appellants' pleadings, affidavits, exhibits and testimony that the Tax Court cases were still open as late as April 2, 1970. Can the Court, in the face of such evidence, reasonably conclude, on a motion for summary judgment, as a matter of law and based on undisputed facts, that the Tax Court cases were closed on September 25,

1969? Appellants submit that exactly such a finding would be required for the Court to affirm the ruling of the lower court on the motion. *Tellez v. Canton Railroad Co.*, 212 Md. 423, 129 A.2d 809 (1957).

3. The Record Raises a Material Issue of Fact as To Whether or Not Appellees Abandoned Their Employment.

A genuine dispute as to another equally material issue of fact arises from the record with regard to whether or not appellees, or such of them as were employed by appellants, abandoned their employment. It is clear that if they did then they failed to perform the contract on which they declare. Hence if appellants' affidavits or other appropriate papers present facts, or support reasonable inferences, to show that they did, the Court would seem to be compelled to deny the motion for summary judgment.

To present such facts and to support such inferences, appellants filed their answer to the motion for summary judgment, the order of the Tax Court of the United States of November 19, 1969, the letter from Fleischmann and Silber to Kirsner dated April 29, 1969, the affidavit of Kirsner, the affidavit of Jacob and the testimony of Jacob at the hearing on the motion on April 2, 1970. All of these are evidence of the fact that appellees withdrew from the Tax Court cases on November 19, 1969. Appellants say that appellees withdrew voluntarily and obliged appellants to obtain and pay new counsel, Jacob. The order of the Tax Court shows that the withdrawal was accomplished upon motions filed by Fleischmann and Silber (E. 16), apparently voluntary acts. The letter from Fleischmann and Silber to Kirsner of April 29, 1969 says in part that,

> "We cannot, of course, compel you to accept any proposed settlement which is acceptable to the Internal Revenue Service. Although we consider the settlement to be not only eminently reasonable and fair to you and in your best interest, it is your right

to determine whether or not you wish to accept it. However, our written contingent fee arrangement contemplates that the savings in taxes, penalties and interest on which it is based, are those which could be obtained regardless of your ultimate acceptance. If the savings afforded by Mr. Mueller's written settlement proposal are not acceptable to you, your refusal cannot affect the agreed fee which we have earned in this matter. We are, therefore, submitting our bill for services based on the letter dated July 26, 1966, a copy of which is attached. We are prepared to advise the Clerk of the U.S. Tax Court to strike our appearances as counsel, and you will be free to engage other counsel to represent you before the Tax Court. We will cooperate with your new counsel, to the fullest extent possible, including making available to him all of our records, providing, of course, you have theretofore paid our bill in full.

"So that you are aware of our firm resolve in this matter, please be advised that unless payment or arrangement for payment is made within fifteen (15) days from the date of this letter, we will take whatever court action we deem necessary to protect our interest.

"This entire matter has been reviewed with Mr. Myer Sigel and Mr. Bernard Felcher, who are in full accord with the contents of this letter." (E. 19)

The tone of the quoted portion of appellees' letter suggests a voluntary act, as well as a cavalier interpretation of the alleged fee contract. They are certainly not entitled to dictate to appellants, by threat of fees or otherwise, what settlements appellants will or will not take.

The affidavit of Jacob says that in addition to striking out their appearances in the Tax Court on November 19, 1969 Fleischmann and Silber "were called as witnesses for the Government and testified on behalf of the Government" (E. 52). At the hearing in the lower court on April 2, 1970 Jacob testified that in the Tax Court "Mr. Silber

and Mr. Fleischmann were called as adverse witnesses by the Government" (E. 46).

It is apparent that evidence is presented by appellants' pleadings, affidavits, exhibits and testimony to show that appellees voluntarily quit appellants' service. (Appellees, of course, say they did not quit. That appellees by Fleischmann's supplemental affidavit sought to explain away the effect of the papers just reviewed only emphasizes the effectiveness of appellants' affidavits and other evidence to raise a material factual issue on the point.) Can the Court, in the fact of such evidence, reasonably conclude, on a motion for summary judgment, as a matter of law and based on undisputed facts, that appellees did not abandon or improperly terminate their employment? Appellants submit that exactly such a finding would be required to support the ruling of the lower court on the motion. *Tellez v. Canton Railroad Co.*, 212 Md. 423, 129 A.2d 809 (1957).

4. The record raises a material issue of fact as to whether any express contractual relationship existed between appellants and appellee Silber (or appellees Sigel and Felcher).

Summary judgment was entered below based on the special count of the declaration and hence was founded upon the alleged contingent fee contract contained in the Kirsner letter of July 26, 1966. That contract on its face is directed to Fleischmann, to whom the letter is addressed. If that contract did not extend to appellees Silber, Sigel and Felcher, then they are not entitled to judgment under it, summary or otherwise, whatever their rights, if any, to compensation might otherwise be, and hence are not entitled to the summary judgment entered below.

The letter is addressed to Fleischmann alone (E. 6). It says "you" (E. 6) are authorized to act as attorney. It says "you" will be paid the sums mentioned. It says nothing of Silber. It authorizes Fleischmann to act only "as attorney,"

but to act as such "jointly with Myer Louis Sigel and Bernard Felcher, my accountants" (E. 6).

Appellees say that Silber gets into the act because Fleischmann "with Kirsner's consent, on his behalf and on behalf of all of the corporate Defendants, . . . retained Silber, a CPA and Attorney, as co-counsel at no additional expense to any of the Defendants (E. 4). Kirsner, for appellants, says on the other hand "[t]hat the Defendants never engaged directly or indirectly with any arrangements with the Plaintiffs Samuel Silber, nor were the defendants ever consulted with as to whether or not they were agreeable to employing Samuel Silber to perform any services for them" (E. 21). A clearer conflict of fact is difficult to conceive. The materiality of the issue thereby arising is that unless Silber was a party to the Kirsner letter contingent fee contract, a genuinely disputed matter on the instant record, then the summary judgment entered below and which runs in his favor cannot stand.

The same dispute arises from the record with respect to Sigel and Felcher. They are no more parties to the Kirsner letter contract than is Silber. That they, who are accountants, not lawyers, are merely mentioned therein, in an instrument which purports to be an arrangement for legal services, scarcely makes them contracting parties. Suppose they had refused to act "jointly" with Fleischmann. Could appellants by virtue of the Kirsner letter have maintained against them an action for breach of contract? Appellants submit that they patently could not. For the same reasons as are cited with respect to Silber, the summary judgment entered below, insofar as it runs in favor of Sigel and Felcher as well, cannot stand.

5. The record raises material issues of fact as to whether any contingent fee obligations sought to be imposed upon appellants were joint or several.

Since summary judgment was entered against all appellants in the full amount of appellees' contingent fee claim, to support the action of the lower court it must appear from the record that upon undisputed facts and as a matter of law the obligation sought to be imposed upon appellants under the Kirsner letter contract was a joint and not a several one. Appellants submit that the record raises issues of fact as to whether the contingent fee arrangement which underlies the judgment sought to impose joint or several obligations.

The instrument involved does not state whether it intends to impose joint or several liability. It is silent on the point. There are, however, facts presented in the record as to the construction in that regard put upon the Kirsner letter by the parties. Those facts are sufficient to raise a genuine dispute on the point.

Kirsner in his affidavit said:

> "9. That during the time that the Plaintiffs were performing the services alleged for the Defendants, your Affaint repeatedly urged the Plaintiffs to approach the matter in a manner which would reserve the separate corporate entity concept so important to the Defendants; and that the Plaintiffs regarded the said instructions; and proceeded to negotiate the matter on the basis of separate corporate deficiency. That certain of the Defendant corporations, namely REGENCY REALTY, INC., THE "516" INC., and JADE REALTY, INC., named as Defendants in the Plaintiffs' action were never assessed with tax deficiencies by the Internal Revenue Agent's report.
>
> * * *

> "11. That the Defendants in this matter are each separate and distinct corporate entities; and that the Defendants have never been advised by the Plaintiffs as to what, if any, claims for services the Plaintiffs are making against each of the individual Defendants." (E. 21)

Fleischmann and Silber, in their letter to Kirsner of April 29, 1969, acknowledge that ". . . unfortunately, you have exhibited an abhorrence at the mere suggestion of an aggregation of the income and losses of the various corporations because of the connotation of 'consolidation' or 'merger' . . ." (E. 18) which they indicate they believe to be unfounded. And in his letter to Kirsner of July 16, 1969 Silber says in part,

> "In due course you should receive the appropriate tax notices for which payment should be made from the funds of each respective corporation. At the same time, we would anticipate that payment would be made of the professional fees in accordance with the prior fee agreement." (E. 27)

Appellants submit that the evidence cited sets out facts or supports reasonable inferences to establish that the parties considered that the Kirsner letter created several, not joint, obligations on the part of the various corporate appellants. If that is so, then those same facts and inferences are sufficient to vitiate a summary judgment entered against all appellants for the full amount of appellees' claim, since unresolved factual issues exist as to the extent of each appellant's obligation, if any. Some, as noted, could not have been obligated at all, since no deficiencies were ever assessed against them. Others might have had varying degrees of involvement, determined by the particular tax savings realized.

The issues so raised required trial. Summary judgment should not have been entered. To impose upon separate entities responsibility for obligations of others in the circumstances of the instant cause without affording them a full evidentiary hearing in which to establish or refute their

liability for the alleged debt involved is to deprive them of due process of law and deny them the equal protection of the laws, all contrary to and in violation of the 19th and 23rd Articles of the Declaration of Rights of the Constitution of Maryland and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and employs a proceeding under a motion for summary judgment to usurp and circumvent the functions of trial.

6. The record raises material issues of fact as to whether the amount of the judgment awarded below should have been computed by the percentage formula contained in the Kirsner letter, or on the basis of a quantum meruit.

If in fact issues exist, as appellants contend, as to whether or not appellees performed their contract, then entry of summary judgment below for an amount calculated according to the formula contained in the Kirsner letter was error. The proposition that in the absence of performance on his part a contracting party is not entitled to the consideration specified in the contract, but only to a quantum meruit, is certainly a sound one, not requiring citation of authorities for its support. Since the record raises material issues as to such performance vel non in the instant cause, summary judgment for the contract price was not warranted. Of course Silber, Sigel and Felcher were not entitled to the contract price in any event, since they were not parties to the Kirsner contract, but would be relegated to a quantum meruit whether they performed or not. And there is in the record no evidence at all to establish the value of any services supposedly rendered and thus support a judgment outside the Kirsner letter formula.

B. THE LOWER COURT ERRED IN DECIDING CONTROVERTED ISSUES OF FACT, INSTEAD OF SIMPLY ASCERTAINING IF SUCH ISSUES EXISTED.

The learned judge below recites in his memorandum opinion that,

> "There is no genuine dispute of the fact that the Plaintiffs and Defendants entered into a written contract of services under which the former were employed to represent the latter in connection with an income tax problem arising out of an audit dated June 29, 1966. Further, it cannot be disputed that this agreement sets forth the rights and obligations of the respective parties, including the formula for Plaintiffs' compensation once that party has performed." (E. 28)

In those recitals he has already *decided* that all appellees were *parties* to the Kirsner letter contract, a point on which, as has been demonstrated, the record raises substantial issues of fact. Silber, for instance, is certainly not a party to any "written contract of services" appearing in the record, or at least there is in the record facts which raise grave doubt and create a genuine dispute as to whether or not he is, which is all that is required to prevent the lower court from deciding on a motion for summary judgment that he is.

The court thereafter repeats its assertion regarding the non-existence of factual disputes and then decides what appellants submit are key disputes of fact.

> "Further, it is the Court's opinion that there is nothing before this Court that creates a genuine dispute of any material fact in this case.
>
> "On the critical questions involved in this motion, the Court finds that the Plaintiffs have performed fully and in accordance with the contract of July 26, 1966, as evidenced by executed agreement of settlement dated July 1, 1969. * * * The Court further finds that the stipulated decisions entered by the Tax Court were final judgments, determina-

> tive of all issues pertaining to tax problems before it. * * * Finally, the Court finds that after Plaintiffs negotiation and Defendants signing of the settlement, the attempt to repudiate the agreement by the latter justified the former withdrawal from the case; and the said striking of Plaintiffs appearance does not effect the Plaintiffs right their attorneys' fee under the contract.
>
> "For the foregoing reasons, it is the Court's opinion that Plaintiffs' Motion for Summary Judgment should be granted and a proper order will be signed upon submission by Plaintiffs." (E. 30)

But, as this Court noted with respect to an analagous situation in *City of Baltimore v. Allied Contractors*, 236 Md. 534, 204 A.2d 546, 551 (1964),

> "Summary judgment was not proper or permissible under such circumstances. Md. Rule 610d1; Roland v. Lloyd E. Mitchell, Inc., 221 Md. 11, 19, 155 A.2d 691; Tellez v. Canton Railroad Co., 212 Md. 423, 129 A.2d 809; White v. Friel, 210 Md. 274, 123 A.2d 303,"

because

> ". . . There were conflicting factual contentions to be resolved, or at the least, differing significant inferences that could have been drawn from what the various witnesses testified had been said and done, and the trial court made factual resolutions and drew inferences in arriving at his decision." (*Id.*)

Appellants submit that the court below tried the case,* instead of trying the issue whether any genuine disputes of

*It is interesting to note that in an earlier ruling, on appellants' demurrer to the nar., the lower court held that the issue whether appellees' claim was joint or several "seems to be a matter of fact which must be proven" (E. 11) and that appellants' "claim of unconscionability is one to be weighed in light of all the surrounding facts and circumstances, and the cited IRS regulation is one of such facts and circumstances" (E. 11). These, of course, are two of the issues which the court necessarily decided in its disposition of the motion

material facts existed. A party cannot be compelled, under the guise of a motion for summary judgment, to try his case on affidavits and without the benefit of cross examination. *Milstead v. W. F. Ballard & Co., Inc.* (D.C. Mun. App.), 76 A.2d 589, 590 (1950).

The single issue now before the Court is whether appellants are entitled to a trial and an opportunity to establish if they can that they have meritorious defenses to appellees' claims. That issue in this case, appellants submit, should be resolved in their favor.

CONCLUSION

For the reasons stated, the order of the lower court entering summary judgment for $40,276.93 in favor of all appellees against all appellants should be reversed and the cause should be remanded for further proceedings, including trial on the merits.

Respectfully submitted,

RUSSELL JAY BENNETT,
BERNARD J. SEVEL,
Attorneys for Appellants.

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for summary judgment, despite that it characterized them earlier as factual issues. The various papers filed subsequent to the ruling on demurrer would not seem to have removed from these issues their essentially factual nature.

COURT OF APPEALS OF MARYLAND

[caption omitted in printing]

OPINION

This dispute is over a problem as ancient as the practice of law: the payment of attorney fees. The disgruntled client and appellant is Milton F. Kirsner, who is himself a member of the bar, although he is now primarily active in the real estate business. He appears in this case individually and as president of twenty corporations (also appellants) in which he is sole or principal stockholder. He and his corporations were made defendants in the present action for resisting the appellees' attempts to collect a $38,497.65 contingent fee for their services in a tax case. Appellee Fleischmann is a tax attorney, while appellees Sigel and Felcher were Kirsner's own Certified Public Accountants. Silber, who is both an accountant and attorney, entered the case at Fleischmann's request as his co-counsel. Together the appellees sought to obtain summary judgment for the claimed amount (plus interest) in the Superior Court of Baltimore City. The trial judge, Howard, J., granted their motion on the ground that there was nothing before him which "created a genuine dispute of any material fact in this case." We are in complete agreement with this observation.

The memorandum of the contract which brought this case into being was dated July 26, 1966 and was subsequently filed as an exhibit in the appellees' motion for summary judgment. It reads as follows:

> Dear Mr. Fleischmann:
>
> This letter is to confirm our oral understanding authorizing you to act as attorney on my behalf and on behalf of each of the corporations, listed on the schedule attached (each of which I am the president and the officer authorized to act), in connection with the income tax problem and Internal Revenue

Service audit dated June 29, 1966, jointly with Myer Louis Sigel and Bernard Felcher, my accountants.

You will be paid the sum of Seven Thousand Five Hundred Dollars ($7500) in retainer fees and fifteen per cent (15%) of all savings on taxes, penalties and interest resulting to these corporations and to me when compared to the audit dated June 29, 1966.

/s/ Milton F. Kirsner,
Individually and on behalf of said corporations

On April 29, 1969 Fleischmann and Silber informed Kirsner in a letter (included as an exhibit in Kirsner's opposing affidavit) that they had secured an offer from the Internal Revenue Service which reduced the claimed tax deficiency of $346,399.82 to $172,050.02.[1] In that letter they took cognizance of Kirsner's long illness and his strong reluctance to "aggregate" the corporations' incomes for tax purposes. They pointed out that nevertheless this was an "eminently reasonable and fair" offer, which Kirsner did not have to

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[1] The final savings on which the judgment was based was $256,651.01. Calculating the total savings in taxes, interest and penalties, Fleischmann filed the following statement of account as an exhibit:

Taxes and Penalties, per agent's report	$346,399.82	
Taxes and Penalties, per actual assessments	150,000.00	
Savings in Taxes and Penalties		$196,399.82
Interest Calculated on deficiencies, per agent's report	108,324.70	
Interest Calculated on actual assessments	48,073.51	
Savings in Interest		60,251.19
Total Savings		$256,651.01
Fee - as agreed - @ 15% of Savings of $256,651.01 in tax, penalties and interest		$ 38,497.65

Kirsner has not questioned the mathematical accuracy of this computation.

accept, but if he did not accept, they were prepared to strike their appearance as counsel. Fleischmann and Silber also made it clear that in their opinion the 15% counsel fee had been completely earned. Sigel and Felcher concurred in this letter.

Although Kirsner now claims that letter amounted to an abandonment of the contract, he ultimately accepted the offered savings. On July 1, 1969, Judge Sterett of the Tax Court of the United States placed his signature on seventeen consent decrees resulting in the indicated tax saving for the corporations and, as president of the real estate companies involved, Kirsner signed an assenting stipulation which appeared on each decree. By August 1, 1969 Kirsner attempted to repudiate these settlements, causing Fleischmann and Silber to withdraw from the case. The appellant obtained a new attorney who filed a motion in the United States Tax Court to have the consent decrees vacated. This request was denied and although it is still pending in the United States Court of Appeals for the Fourth Circuit (it had not been terminated as of the filing date of this opinion), the appellees successfully pressed on with their claim for the contingent fee.

On appeal from the judgment ordering him to pay the contingent fee, Kirsner has attacked every aspect of the transaction with the appellees, asserting that the pleadings, affidavits, exhibits and testimony raised material issues of fact which should have prevented summary judgment as a matter of law. The following list should suffice to show the breadth of his attack.

1. The contract was ambiguous, thus necessitating an evidentiary hearing to determine the intent of the parties.

2. The contingent fee sought was unconscionably high, and the fee arrangement was illegal.

3. The Tax Court case has not yet been terminated and hence the performance required by the contract has not yet been completed.

4. The appellees had abandoned their employment under the contract.

5. Neither Silber nor Felcher nor Sigel was a party to the contract.

6. The fee obligation was several not joint, and should have been computed on a quantum meruit basis rather than on the agreed percentage, and

7. The trial court erroneously decided contested issues of fact, instead of simply ascertaining if such issues existed.

Maryland Rule 610(d) 1 provides that in a motion for summary judgment:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As Judge Singley, speaking for the Court in *Lipscomb v. Hess*, 255 Md. 109, 118, 257 A.2d 178 (1969), has noted:

> "The limitations on summary judgment procedure are too well known to require elaboration. It is not a substitute for trial but a hearing to determine whether a trial is necessary, *Whitcomb v. Horman*, 244 Md. 431, 224 A.2d 120 (1966); *Strickler Engineering Corp. v. Seminar, Inc.*, 210 Md. 93, 122 A.2d 563 (1956), when there is no genuine controversy, *Pullman Co. v. Ray*, 201 Md. 268, 94 A.2d 266 (1953). The purpose of the hearing is not to determine disputed facts, but to determine whether such issues exist. *Horst v. Kraft*, 247 Md. 455, 231 A.2d 674 (1967); *Carroccio v. Thorpe*, 222 Md. 38, 158 A.2d 660 (1960); *Tellez v. Canton R.R. Co.*, 212 Md. 423, 129 A.2d 809 (1957); *White v. Friel*, 210 Md. 274, 123 A.2d 303 (1956). If facts are susceptible of more than one inference, the inferences must be drawn in the light most favorable to the person against whom the motion is made,

> *Lawless v. Merrick*, 227 Md. 65, 175 A.2d 27 (1961), and in the light least favorable to the movant, *Howard Cleaners of Baltimore, Inc. v. Perman*, 227 Md. 291, 176 A.2d 235 (1961); *Roland v. Lloyd E. Mitchell, Inc.*, 221 Md. 11, 155 A.2d 691 (1959)."

See also Shatzer v. Kenilworth Warehouses, Inc., ____ Md. ___, A.2d ____ (1971) [No. 294, September Term, 1970, filed March 2, 1971] and *Brown v. Suburban Cadillac, Inc.*, 260 Md. 251, 272 A.2d 42 (1971).

Viewing the appellants' attempted defense to the granting of summary judgment, we have concluded that their various allegations do not reveal the presence of a genuine controversy of any material fact. For convenience we shall refer to Kirsner and the corporations he represents in the singular person.

Kirsner's first assertion, which challenges the clarity of the contract, appears to focus on the same questions he raises in points three and five, which are concerned with when payment was due and who was to be paid. We shall deal with each of these matters separately. Payment under the contract was clearly to be preceded by performance. Whether performance was completed may or may not be related to the termination of the tax case. Whatever relationship exists between these closely intertwined questions, we think the ultimate result is frankly a matter of legal deductions from undisputed facts that have no controverted secondary factual inferences. See *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 138-39, 265 A.2d 256 (1970). Kirsner, acting individually and on behalf of his corporations, has never denied that he affirmatively assented to the decrees. Nor does he challenge the legal effect of his acceptance of the tendered performance of the contract. Kirsner had at least two major objections to the appellees' handling of the case, namely, their inability to avoid aggregating the corporations' incomes and their insistence that they would pursue the matter no further before the tax court. Valid or not these make no difference, for any objection he may

have harbored before agreeing to the settlement was completely waived by knowingly and voluntarily accepting less than what he now claims was strict performance. *John B. Robeson v. Gardens,* 226 Md. 215, 223, 172 A.2d 529 (1961); 17 Am. Jur. 2d, *Contracts* § 392 (1964).

Kirsner's attempted repudiation of his own acceptance is made even less tenable by the fact (which he does not contest) that he endorsed the decree which by its very terms recited that it had been entered pursuant to the agreement of the parties. Either an endorsement or a recitation such as this (and certainly both together on a decree) add a critical element to his contractual act: judicial conclusiveness. *Mercantile Trust Co. v. Schloss,* 165 Md. 18, 166 A. 599 (1933); 3 *Freeman on Judgments,* §§ 1349 and 1350 (5th ed. 1925). Had we the benefit of a final decision upholding the tax court decree, it would be a simple matter to invoke the rule announced in *Cox v. Md. Elec. Rwys, Co.,* 126 Md. 300, 304, 95 A. 43, L.R.A. 1917A 270 (1915) that ordinarily a judgment by consent, having been enrolled "under the eye and with the sanction of the court . . . should be considered as a judicial act not open to question or controversy in any collateral proceeding . . . ." *See also Freeman on Judgments, supra,* §1352. We detect no problem, however, with the fact that the appeal from the denial of the motion to vacate is still pending, for Kirsner has offered no legal or logical theory as to why the vacation of the consent decree would have any necessary effect on the acceptance of performance which served as a basis for that decree. Indeed, he has never attempted to deny the critical fact of his acceptance.

Kirsner has offhandedly raised some question concerning his mental capacity to consent to the decree and presumably to accept performance. At the hearing on the motion for summary judgment his present tax lawyer testified that medical reports concerning Kirsner's mental capacity had been "proffered" to the tax court in the motion to vacate and, during a colloquy with Judge Howard, Kirsner's trial

attorney suggested that he could introduce those records in this case. There was, however, no attempt by affidavit or otherwise to follow this through and properly make known to the trial judge evidentiary facts capable of supporting this bare intimation. As Chief Judge Prescott said for the Court in *Tri-State v. Middleman*, 238 Md. 41, at page 47, 207 A.2d 499 (1965):

> "Under summary judgment procedure 'general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment,' for the 'supporting and opposing affidavits must submit evidentiary facts to the Court.' *Frush v. Brooks*, 204 Md. 315. See also *Strickler Engineering Co. v. Seminar, Inc.*, 210 Md. 93; *Evans v. Johns Hopkins Univ.*, 224 Md. 234. If this were not so, the real and crucial purposes of summary judgment procedure—to avoid delays and unnecessary costs—would be subverted and thwarted, for if one could simply make a general denial or a bald statement that material facts were in dispute, without the actual statement of such evidentiary facts, there would few, if any, summary judgments granted."

An identical criticism may be leveled at Kirsner's bare allegations that the contingent fee was unreasonably high and that the fee arrangement was illegal under one Internal Revenue procedure rules. In ruling on these points in a demurrer filed early in the summary judgment case, Judge Howard admonished Kirsner that these allegations would require factual support. No attempt was ever made to supply that deficiency in the opposition to the motion for summary judgment.

Kirsner also contended that the appellees had abandoned the contract by striking their appearance as counsel. As the only possible evidentiary support for this assertion is the threat of withdrawl contained in the April 1969 letter from Fleischmann and Silber to Kirsner, we have little difficulty in determining that the appellant has completely failed

to raise a material factual issue in this regard. If, as we have decided, the appellees' performance had been completed and accepted, they had no further obligation to continue representing their former client, especially while he attacked the fruits of their labor. Other than payment, the acceptance of performance and the signing of the decree was the terminus of this contractual relationship; what the parties did or threatened to do after this point simply has no relevance to the question of liability. As we have held in *Parklawn v. Nee*, 243 Md. 249, 254, 220 A.2d 563 (1966):

> "In order to prevent the granting of a motion for summary judgment the objecting party must show more than that there was a question of fact presented, he must, of course, also show that the resolution of that question will somehow affect the outcome of the case, *i.e.*, that it is a material fact."

With the determination that performance under the contract had been finally accepted by Kirsner, we think it is obvious that payment should be according to the percentage formula set forth in the contract itself rather than on a quantum meruit basis. It is equally obvious that Judge Howard has not decided controverted issues of material fact but only ascertained that no such issues existed. This leaves for discussion a point that was never placed before him for decision, and two points which he never expressly decided.

Dealing first with what was not raised below, we find that no objection was made in the trial court to the inclusion of the accountants, Sigel and Felcher, as parties. This question cannot now be reviewed on appeal. Maryland Rule 885; *Schiller v. Lefkowitz*, 242 Md. 461, 476, 219 A.2d 378 (1966); *Guerassio v. American Bankers*, 236 Md. 500, 504, 204 A.2d 568 (1964). Kirsner did make timely objection to Silber's status as a party and to the undiscriminating method by which the trial court entered judgment in a single amount against all of the appellants as a group, especially since three of the corporations gained no tax advantages whatsoever. As far as the formal rendition of the judgment is concerned, we perceive no error, for the

contract on its face calls for a joint and several obligation to pay. There is, of course, no reason why Kirsner cannot apportion the cost of the judgments according to the proportionate losses or benefits in tax savings each corporation received under the consent decrees. The inclusion of Silber as a party, however, was erroneous, for Kirsner directly denied that he ever consented to or was consulted about his presence in the case. A remand will not be necessary to resolve this rather minor question of fact since the appellees admit and Kirsner has never denied that Fleischmann retained Silber "at no additional expense to any of the Defendants." Silber, of course, can look to Fleischmann for his compensation. Accordingly, summary judgment in favor of the appellee Silber will be reversed and entered against him. Rules 610(d) 1, 872(b), 875(a) and (b). Summary judgment in favor of the other three appellees will be affirmed.

JUDGMENT IN FAVOR OF ALL THE APPELLEES, EXCEPT SAMUEL L. SILBER AFFIRMED AND JUDGMENT IS ENTERED IN FAVOR OF THE APPELLANTS AGAINST SAMUEL L. SILBER FOR COSTS. ALL COSTS ON APPEAL TO BE PAID BY THE APPELLANTS.

IN THE SUPERIOR COURT
OF BALTIMORE CITY

[Caption omitted in printing]

DEFENDANTS' DEMURRER

Now come the Defendants in the above-captioned matter, by Bernard J. Sevel and Russell Jay Bennett, their attorneys, and Demur to the Declaration filed against them in the above-captioned matter, for the following reasons:

1. That the Declaration sets forth work done on behalf of the Defendants by certain attorneys and accountants, and indicates that the fees incurred are to jointly pay attorneys and accountants for their services rendered. That the Plaintiffs' exhibit no. 2 fails to provide a division of fees charged for accounting services and fees charged for legal services. The Declaration goes on to clearly indicate that the Plaintiffs have functioned in this regard on the basis of "dual practice", that is as accountants and as lawyers. That said practice is contrary to public policy and thus renders the agreement for services rendered void and unenforceable.

2. That the Declaration alleges services rendered on behalf of all of the Defendants, both individual and corporate. That said declaration fails to show the alleged savings for each of the Defendants and instead lumps the total claim against all Defendants, thus requiring the Court to speculate as to what, if any, claim the Plaintiffs may have against each of the Defendants separately. It is the position of the Defendants that these obligations to the Plaintiffs, if they exist at all, are severable and not joint.

3. The Agreement referred to in the Declaration as to fee arrangement was dated July 26, 1966. At that time, the regulations as set forth in RULES GOVERNING THE PRACTICE OF ATTORNEYS AND AGENTS BEFORE THE INTERNAL REVENUE SERVICE prohibited wholly contingent fees unless the taxpayer was indigent, and prohibited partially contingent fees unless a minimum substantial retainer had been paid. In the instant matter the Plaintiffs have requested a total

fee of $38,497.65 in addition to a $7,500.00 retainer. It is submitted that, in comparing a $7,500.00 retainer to a contingent fee of $38,497.65, one must reach the conclusion that either the $7,500.00 retainer was not substantial or that the total fee of $45,997.65 is unconscionable. It is pointed out that under circular 230, as revised, of RULES GOVERNING THE PRACTICE OF ATTORNEYS AND AGENTS BEFORE THE INTERNAL REVENUE SERVICE section 10.28, Fees, says that an unconscionable fee for representation of a client in any matter before the Internal Revenue Service is prohibited, thus rendering the alleged agreement between the Plaintiff and the Defendants as void and unenforceable as being illegal and against public policy.

4. That the Declaration clearly indicates that part of the alleged services rendered by the Plaintiffs was that of accounting and the other part was that of legal services. That clearly the Plaintiffs' actions are not united and that the filing of their joint actions in one count is improper under the Maryland Rules of Practice and Procedure.

5. That the Plaintiffs failed to alleged that the fee requested for them was fair and reasonable. The absence of said allegation the Defendants submit renders the Declaration defective.

WHEREFORE, the Defendants pray that the Declaration be dismissed with costs to the Plaintiffs.

/s/ Bernard J. Sevel

/s/ Russell Jay Bennett

Attorneys for the Defendants

TAX COURT OF THE UNITED STATES

[Caption omitted in printing]

DECISION

Pursuant to agreement of the parties in the above-entitled case, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the fiscal year ended June 30, 1964, in the amount of $330.24; and

That there is an addition to the tax due from the petitioner for the fiscal year ended June 30, 1964, under the provisions of Section 6651(a) of the Internal Revenue Code of 1954, in the amount of $36.07.

/s/ Illegible
Judge

Entered July 1, 1969

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in the above-entitled case.

It is further stipulated that, effective upon entry of the decision by the Court, petitioner waives the restrictions, if any, contained in the applicable Internal Revenue laws on the assessment and collection of the deficiency in tax and addition to the tax, plus statutory interest.

/s/ Milton Kirsner
Petitioner, by Milton Kirsner, President

/s/ Richard M. Hahn
Acting Chief Counsel
Internal Revenue Service

Served July 1, 1969

IN THE SUPERIOR COURT OF BALTIMORE CITY

1610/1969/120363

[Caption omitted in printing]

DOCKET ENTRIES

1969

September 25 - Memorandum Narrative, Notice, Motion for Summary Judgment, Affidavit and Exhibits filed. $38,497.65.

September 25 - Twenty One copies sent with Twenty One copies of writ Summoned Omnes.

October 24 - Appearance of Bernard J. Sevel and Russell Jay Bennett for Defendants, same day Demurrer to Narrative filed. Copy mailed.

October 24 - Defendants' Memorandum in Support of Demurrer filed. Copy mailed.

November 17 - Defendants' Demurrer to Narrative "overruled" with leave to Plead and Answer Motion for Summary Judgment within 15 days. Memorandum of Court (Howard, J.) filed.

December 18 - Defendants' answers to Plaintiffs' Motion for Summary Judgment and Affidavit filed. Copy mailed.

1970

January 23 - Plaintiff's (Arnold Fleischmann) Supplemental Affidavit filed. Copy mailed.

March 30 - Defendants' Motiion Ne Re to Plaintiff, Memorandum of March 26, 1970 filed. Copy mailed.

June 9 - Plaintiffs' motion for Summary Judgment "Granted" upon Submission by Plaintiffs of Proper Order. Memorandum filed. (Howard, J.)

June 12 - Ordered that Summary Judgment be entered in favor of the Plaintiffs for the sum of $40,276.93 with interest from date and costs of suit as against the Defendants - MILTON F' KIRSNER, CITATION REALTY CO., INC.,

DIAMOND REALTY INC., EARL REALTY INC., FREE STATE REALTY CO. INC., GEM REALTY INC., THE GREAT UNITED REALTY CO., INC., THE IDEAL REALTY CO., JEWELL REALTY INC., THE LINDEN HOLDING CO., OPAL REALTY INC., PLATINUM REALTY INC., PRINCE REALTY, INC. SECURITY REALTY CO., INC. THE SUNRISE REALTY CO., THE SUNSHINE REALTY CO., TOPAZ REALTY INC. THE VICTORY HOLDING COMPANY, REGENCY REALTY, INC. THE "516" INCORPORATED AND JADE REALTY, INC. & Order of Court (Howard, J.) filed.

June 15 - Attachment issued to July Rule Day # 239.

June 29 - Appeal Bond in the Amount of $45,000.00 filed.

July 8 - Defendants' Appeal to Court of Appeals filed. Copy mailed.

July 16 - Ordered that the Penalty of the SUPERSEDEAS BOND to be filed by Defendants herein is fixed at $50,000.00; the surety thereon to be approved by the Clerk. Assent and Order of Court filed. (Prendergast, J.)

July 17 - Additional bond in the Amount of $5,000.00 file.

August 3 - Defendants' Petition to Extend time for transmitting Record to Court of Appeals, Memorandum and Order of Court filed. Copy mailed.

September 3 - Original Papers sent to Court of Appeals.

1971

April 7 - Mandate from Court of Appeals filed.

* * * * *

January 28 - Motion to postpone argument filed.

January 29 - Motion Denied, etc.

March 3 - Judgment in favor of all Appellees except Samuel L. Silber. "Affirmed and Judgment is entered in favor of Appellants against Samuel L. Silber for costs. All costs on Appeal to be paid by Appellants. Opinion by Judge Diggs.

April 2 - Motion for Reargument filed.

April 2 - Motion "DENIED".

IN THE SUPERIOR COURT OF BALTIMORE CITY

1069/1970/124293

[Caption omitted in printing]

DOCKET ENTRIES

1970

June 15 - Attachment on Judgment filed. Debt $40,276.95 with interest from 12 June 1970. Costs $192.50 Paid. Costs $14.00 Open. Writ and six copies sent - Laid in hands of Central Savings Bank, laid in hands of Century Savings and Loan Association, laid in hands of Baltimore Federal Savings and Loan Association, laid in the hands of Maryland National Bank, laid in the hands of Loyola Savings and Loan Association, laid in the hands of Calvert Savings and Loan Association. All Garnishees Summoned.

June 25 - Defendant's Motion to Release and Quash Certain Attachments and Show Cause Order of Court (Foster, C.J.) filed. Copy mailed.

June 29 - An Appeal Bond having been filed in amount of $45,000.00; it is Ordered that this matter is stayed and all Funds and Monies in hands of Garnishees are released. Order of Court filed. (Cole, J.)

June 30 - Appearance of William H. Gorman, III for Garnishee, Central Savings Bank. Same day Plea of Nulla Bona filed. Copy mailed.

July 13 - Plaintiffs' answer to Defendant's Motion to Release and Quash certain attachments and Request for Hearing filed. Copy mailed.

July 13 - Plaintiffs' Motion Ne Recipiatur or to Strike Defendant's Motion to Release and to Quash certain attach-

ments. Memorandum and Request for Hearing filed. Copy mailed.

July 14 - Ordered that Order dated June 29, 1970 be and is rescinded effective June 29, 1970 - Nunc Pro Tunc. The Order entered on June 25, 1970 was in Full Force and Effect. Order of Court filed. (Cole, J.)

July 16 - Ordered that the Lien of Attachment shall continue against all assets of the Defendants listed in Plea of Garnishee filed herein by BALTIMORE FEDERAL SAVINGS AND LOAN ASSOCIATION & FREE STATE REALTY COMPANY, INC. which shall be stayed until receipt of Mandate from Court of Appeals in Case 120363; the ATTACHMENT against CALVERT SAVINGS AND LOAN ASSOCIATION, CENTURY SAVINGS AND LOAN ASSOCIATION, LOYOLA SAVINGS AND LOAN ASSOCIATION, MARYLAND NATIONAL BANK, CENTRAL SAVINGS BANK & FREE STATE REALTY COMPANY shall be dissolved; that all costs in this case shall be paid by the parties directed to pay costs by MANDATE. ASSENT AND ORDER OF COURT FILED. (Prendergast, J.)

November 2 - Appearance of Felix S. Jacob for Defendant, Milton F. Kirsner, et al filed. Copy mailed.

November 2 - Defendants (Kirsner, et al) Motion to Quash Attachments and Show Cause Order of Court filed. Copy mailed.

November 12 - Plaintiffs' Motion Ne Recipiatur or to strike, Memorandum and Request for Hearing filed. Copy mailed.

1971

April 13 - Judgment of Condemnation Absolute in favor of the Plaintiff against Garnishee for $42,969.91 and Order of Court filed. (Cole, J.) Copy mailed.